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Supreme Court, U.S.
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No. : 05-1556

In the

Supreme Court of the United States

DAVID I. LEWITTES,

Plaintiff-Appellant,

-against-

JOAN LOBIS, KENNETH DAVID BURROWS,
BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants-Appellees.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OF NEW YORK

LAW OFFICE OF JOEL LEWITTES
JOEL LEWITTES, ESQ.
Attorney for Plaintiff-Appellant
David I. Lewittes
1125 Park Avenue
New York, New York 10128
(516) 393-8254

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

QUESTION PRESENTED

1. Whether this case, brought under 42 U.C.S. § 1983 and involving fundamental rights as a parent, calls for the exercise of this Court's supervisory powers when it is marked by unusual and demonstrable deviations from the usual course of judicial proceedings, ranging from threats of sanctions solely for commencing an action against an influential state court judge, to changing the caption of the case, to indicate falsely that the action was brought against the state actor in her official, rather than individual, capacity, to entering an "amended" order solely to moot a motion by petitioner, then discarding it when such attempt failed, and the Court of Appeals transparently misrepresenting the nature of the state court post-judgment proceedings, which, it held, determined the issue of the state court's subject-matter jurisdiction, purposely mischaracterizing motions unquestionably for reformations, as found by the District Court, as enforcement proceedings, while (i) holding that respondent Burrows is entitled to quasi-judicial immunity as a court-appointed guardian, contrary to the holding of the state court, against respondent Burrows, that respondent Burrows was not a court-appointed guardian, (ii) and, while rejecting, in its summary order, the reasoning of the District Court, holding that respondent Lobis, the state actor, was entitled to judicial immunity for reasons that cannot be reconciled with the facts, the findings of the District Court, or with prior decisions of this Court and of the Second Circuit or with New York State law for activation of subject-matter jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation.

TABLE OF CONTENTS

Page

Table of Authorities v

OPINIONS BELOW.....1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION.....5

A. REVIEW IS WARRANTED, BECAUSE THE CONDUCT OF THE JUDICIAL PROCEEDINGS BELOW CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER. 6

B. THE COURT OF APPEALS HAD NO SUBJECT-MATTER JURISDICTION TO DECIDE THAT RESPONDENT BURROWS WAS A COURT-APPOINTED GUARDIAN ENTITLED TO QUASI-JUDICIAL IMMUNITY.....14

C. THE DECISION OF THE COURT OF APPEALS CONCERNING QUASI JUDICIAL IMMUNITY OF GUARDIANS CONFLICTS WITH STATE COURT DECISIONS.....17

D. THE DECISION OF THE COURT OF APPEALS ON THE ISSUE OF JUDICIAL IMMUNITY CONFLICTS WITH DECISIONS OF THIS COURT, WITH LEADING SECOND CIRCUIT PRECEDENT, AND WITH STATE LAW 18

1. Decisions Of This Court 18

2. Other Second Circuit Decisions..... 20

3. The Decision Below and State Law. 21

4. Lobis's Subjective Knowledge 27

5. Further Misrepresentations 29

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Page

Bluntt v. O'Connor, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't 2002).....17

Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1871).....19, 20, 21, 23, 29

Bradt IV v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct., Greene Cty. 2002).....17

Brooks v. Hausauer, 51 A.D.2d 660, 379 N.Y.S.2d 306 (4th Dep't 1976).....29

Burke v. Crosson, 85 N.Y.2d 10, 623 N.Y.S.2d 524, 647 N.E.2d 736 (1995).....29

Dennis v. Sparks, 449 U.S. 24 (1980).....16

Dillon v. Dillon, 116 Misc. 2d 53, 455 N.Y.S.2d 68 (Fam. Ct., Allegany Cty. 1982).....24

Exxon Mobil Corp v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005).....16

Fishkin v. Fishkin, 201 A.D.2d 202, 615 N.Y.S.2d 899 (2d Dep't 1994).....25

Fox v. Fox, 263 N.Y. 68, 188 N.E. 160 (1933).....25

Green v. Green, 50 A.D.2d 235, 377 N.Y.S.2d 675 (3d Dep't 1975).....24

In the Matter of Carmen Crespo, 123 Misc.2d 862,
475 N.Y.S.2d 319 (Sup. Ct., N.Y. Cty. 1984) 26

In the Matter of Solkav Solartechnik,
G.m.b.H.[Besicorp Group], 91 N.Y.2d 482,
672 N.Y.S.2d 838, 695 N.E.2d 707 (1998) 26

Luisi v. Luisi, 6 A.D.3d 398, 775 A.D.3d 398
(2d Dep't 2004).....25

Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988),
cert. denied, 489 U.S. 1016 (1989).....21, 23, 27, 28, 29.

Murphy v. Murphy, 24 A.D.3d 330,
807 N.Y.S.2d 28 (1st Dep't 2005).....26

Renzulli v. McElrath, 185 Misc. 2d 242,
712 N.Y.S.2d 267 (Sup Ct., Richmond Cty. 2000),
aff'd, 286 A.D.2d 335 (2d Dep't 2001) 24

Rivers v. McLeod, 252 F.3d 99 (2d Cir. 2001) 9

Sangiacomo v. County of Albany, 302 A.D.2d 769
(3d Dep't 2003).....23

Schram v. Keane, 279 N.Y. 227,
18 N.E.2d 136 (1938) 23, 24

Stump v. Sparkman, 435 U.S. 349 (1978).....20, 23

Tucker v. Outwater, 118 F.3d 930 (2d Cir.),
cert. denied, 522 U.S. 997 (1997).....20, 21, 23, 27

Wheelock v. Wheelock, 3 A.D.2d 25 (1st Dep't 1956),
aff'd, 4 N.Y.2d 706 (1958) 26

Rules and Constitutional and Statutory Provisions

U.S. CONST. amend. XIV, § 1 36

28 U.S.C. §636(b)(1)(C).....9

28 U.S.C. §1254(1).....1

28 U.S.C. §1291.....5

28 U.S.C. §1367.....3

42 U.S.C. § 1983.....2, 3, 9

Sup. Ct. R. 10(a).....7

Sup. Ct. R. 14.1(f).....3

Fed. R. Civ. P. 8.....8

Fed. R. Civ. P. 11.....8

Fed. R. Civ. P. 72(b).....9

Second Circuit Rule §0.23.....9

S.D.N.Y. Local Rule 56.1.....16

N.Y. Civ. Prac. L. & R. 105(p).....30

N.Y. Civ. Prac. L. & R. 304.....2

N.Y. Civ. Prac. L. & R. 5104.....1, 6

N.Y. Dom. Rel. L. §236(9)(b).....25

N.Y. Dom. Rel. L. §240(1)(j) 25

N.Y. Dom. Rel. L. §244.....25

N.Y. Dom. Rel. L. §245.....26

APPENDIX TABLE OF CONTENTS

Summary Order 1a

Judgment dated April 6, 2005 ..... 6a

Order dated March 23, 2005 ..... 9a

Decision dated August 19, 2004 ..... 10a

I. SUMMARY JUDGMENT STANDARDS IN SECTION 1983 CASES n.4 ..... 14a

II. THE DOCTRINE OF ABSOLUTE IMMUNITY FOR STATE COURT JUDGES 16a

III. BECAUSE JUSTICE LOBIS DID NOT ACT IN THE CLEAR ABSENCE OF JURISDICTION, SHE IS ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY 23a

IV. LEWITTES' CLAIMS AGAINST BURROWS AND BBR ARE BARRED BY QUASIJUDICIAL IMMUNITY 37a

Summary Order issued March 14, 2006 ..... 49a

Summary Order dated December 28, 2005 ..... 58a

Amended Summary Order dated January 26, 2006 ..... 62a

Transcript dated February 19, 2004 ..... 66a

Amended Summary Order dated January 26, 2006 ..... 87a

Order dated March 15, 2004 ..... 91a

Order dated November 1, 2002.....93a

Order dated November 1, 2002.....95a

Order dated November 1, 2002.....97a

Order dated October 2, 2003.....102a

Decision and Order dated October 2, 2003.....104a

Amended Complaint dated March 19, 2004.....108a

Notice of Appearance dated March 19, 2004.....109a

Judgment of Divorce dated August 19, 2002.....111a

Petition for Rehearing dated January 9, 2006.....116a

PETITION FOR WRIT OF CERTIORARI

Petitioner, David I. Lewittes, by his attorney, respectfully prays that a writ of certiorari be issued to review the judgment and order of the Court of Appeals for the Second Circuit, in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, App., *infra*, 1a-4a, has not been reported. The opinion of the District Court for the Southern District of New York, App., *infra*, 7a-9a, has not been reported. The Report and Recommendation of the Magistrate Judge of the District Court for the Southern District of New York, App., *infra*, 10a-45a, has not been reported but may be found at 2004 WL 1854082 (S.D.N.Y.).

JURISDICTION

The summary order of the Second Circuit Court of Appeals was filed on December 28, 2005. The Court of Appeals denied a timely petition for a rehearing by order filed as of March 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. XIV, § 1, provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.Y. Civ. Prac. L. & R. 304 provides, in pertinent part, as follows:

> An action is commenced by filing a summons and complaint or summons with notice. A special proceeding is commenced by filing a petition. Where the court finds that circumstances prevent immediate filing, the signing of an order requiring subsequent filing at a specific time and date not later than five days thereafter shall commence the action. For purposes of this section, and for purposes of section two hundred and three of this chapter and section three hundred six-a of this article, filing shall mean the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose together with any fee required as specified in rule twenty-one hundred two of this chapter for filing... At the time of filing, the filed papers shall be date stamped by the clerk of the court who shall file them and

> maintain a record of the date of filing and who shall return forthwith a date stamped copy, together with an index number, to the filing party....

N.Y. Civ. Prac. L. & R. 105(p) reads as follows:

> Matrimonial action. The term "matrimonial action" includes actions for a separation, for an annulment or dissolution of a marriage, for a divorce, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce and for a declaration of the validity or nullity of a marriage.

Pursuant to Sup. Ct. R. 14.1(f), further statutory provisions and rules are set forth in App., *infra*, 50a-57a.

STATEMENT OF THE CASE

This federal civil rights action, arising under 42 U.S.C. §1983, with pendent state law claims, was commenced by petitioner, by filing of a complaint, on January 8, 2004, in the District Court for the Southern District of New York. The District Court had jurisdiction pursuant to the Civil Rights Act, 42 U.S.C. §1983, and principles of supplemental jurisdiction under 28 U.S.C. §1367.

Petitioner filed an Amended Complaint, dated March 22, 2004. The Amended Complaint alleges that petitioner was deprived of his right of liberty, as a parent, namely, the companionship, care, and management of his children, and, as a parent, to his right to equal protection and also, generally, to his right of property, to his substantive and procedural due process rights, and to his right of liberty, with respect to his employment, by respondent Lobis, acting under color of state law, all in the clear absence of jurisdiction, which she knew, and by respondent Burrows, who is liable as a joint participant with joint respondent Lobis, a state actor, for deprivations of petitioner's civil rights, including, but not limited to, those arising from acts of Lobis in the clear absence of jurisdiction. Respondent Bender, Burrows & Rosenthal, L.L.P. ("BB&R"), the

Amended Complaint alleges, is liable for respondent Burrows's wrongful acts since in or about May 2003, from which time respondent Burrows acted also on behalf of the firm.

By motion, dated April 30, 2004, the joint defendants, respondents herein, moved for summary judgment dismissing the action. By cross-motion, dated May 21, 2004, petitioner moved for partial summary judgment on his federal law claims and, by motion, dated June 23, 2004, moved for Rule 11 sanctions against respondents and Mr. Hilary Miller, counsel for Burrows and BB&R.

Chief Magistrate Judge Andrew J. Peck issued a report and recommendation, dated August 19, 2004 (the "R&R"), recommending that the motion for summary judgment of respondents, dismissing the action, be granted and denial of the motions of petitioner for partial summary judgment and for sanctions. The R&R recommended dismissal of the claims against respondent Lobis on the grounds, in conflict with decisions of this Court, that a judge on a court of general jurisdiction always is protected by judicial immunity, even were such jurisdiction not invoked. Further, the R&R recommended dismissal of petitioner's claims against the other respondents on the grounds that respondent Burrows has quasi-judicial immunity as a court-appointed guardian, though, in fact, the state court held, against respondent Burrows, in state court, that his role was not that of a guardian but only that of a mediator appointed, in a stipulation of divorce, by petitioner and his ex-wife to assist them to resolve disputes between them concerning the children, and contrary to state law.

Petitioner objected to the R&R, by objection dated September 28, 2004.

By order, dated March 23, 2005, the Honorable Jed S. Rakoff adopted the recommendations and reasoning of the R&R. By judgment, entered on April 6, 2005, the action was dismissed with prejudice.

Petitioner timely appealed to the Second Circuit Court of Appeals.

The Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. §1291, by summary order, filed on December 28, 2005 ("Opinion"), completely disregarded the District Court's findings and reasoning with respect to the issue of judicial immunity but affirmed the judgment based on its gross mischaracterizations of law and fact and in conflict with prior decisions of this Court and of the Second Circuit and contrary to New York State law on invocation of subject-matter jurisdiction.

Petitioner timely filed a petition for a rehearing, dated January 9, 2006. A mandate was issued on March 14, 2006, and the petition for a rehearing, presumably, previously had been denied, by order, on March 6, 2006.

REASONS FOR GRANTING THE PETITION

This case, marked by objectively discernible deviations, by the federal courts, from the usual course of judicial proceedings, ranging from threats of sanctions simply for having deigned to commence an action against a powerful state court judge, when the complaint admittedly had not even been read by the court, to changing the caption of the case, to indicate falsely that the action was brought against the state actor in her official, rather than individual, capacity, to entering an "amended" order solely to moot a motion brought by petitioner, then discarding it when such attempt failed, calls for the exercise by this Court of its supervisory powers.

Further, the Court of Appeals, below, while rejecting, in its summary order, the reasoning of the District Court and transparently misrepresenting the nature of the state court post-judgment proceedings, mischaracterizing them, contrary to the District Court's finding and the record, as enforcement proceedings, which, the court held, materially affected the state court's subject-matter jurisdiction, held that respondent

Lobis, the state actor, was entitled to judicial immunity for reasons that cannot be reconciled with the facts, the findings of the District Court, or with prior decisions of this Court and of the Second Circuit or with New York State law for activation of subject-matter jurisdiction while holding, as well, that respondent Burrows is entitled to quasi-judicial immunity as a court-appointed guardian, contrary to the holding of the state court, adverse to respondent Burrows, that held that respondent Burrows was not a court-appointed guardian.

A. REVIEW IS WARRANTED, BECAUSE THE CONDUCT OF THE JUDICIAL PROCEEDINGS BELOW CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

In this case, raising important questions as to a federal court's jurisdiction to overrule a state court's clear and unambiguous holding on a matter of state law and as to the doctrine of judicial immunity, petitioner seeks review of a decision of the Court of Appeals below that conflicts with prior decisions of the Court, precedents in the Second Circuit, and New York State law on invocation of subject-matter jurisdiction, involves deprivations of a parent's fundamental right of liberty, and begs for this Court's exercise of its supervisory power in light of the irregularities below raising substantial due process concerns.

The appalling pattern of consistent, indefensible, and overt misconduct, by both the Court of Appeals and the District Court below, included, *inter alia*, changing the caption of the case, falsely to indicate that the state actor was sued in her official, rather than individual, capacity, threatening both petitioner and his counsel with sanctions, when the complaint admittedly had not even been read, expressly solely because petitioner deigned to sue a state court judge, and issuing an "amended" order, later discarded, solely for the obvious purpose of seeking to moot

petitioner's petition for a rehearing. Such conduct "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

The Court of Appeals below, committing exceptional error, notoriously and, quite apparently, intentionally, as noted earlier, for the purpose of protecting an influential state court judge, who deprived petitioner of his constitutional rights, as a parent, in the clear absence of jurisdiction, grossly misrepresented the state court proceedings, all after a terminated action, without the commencement of a plenary action, and the applicable law, disregarding the directives of this Court and state statutory law for invoking subject-matter jurisdiction.

At a preliminary conference before Chief Magistrate Judge Andrew J. Peck, of the District Court for the Southern District of New York, Magistrate Judge Peck, though he admittedly had not read petitioner's complaint and was unfamiliar with the applicable law, App., *infra*, 75a-77a; (A-177, 206-07),[1] continually threatened petitioner and his counsel with sanctions, expressly for the sole reason that petitioner had commenced an action against a sitting judge in the State of New York, App., *infra*, 67a, 73a-75a; (A-177, 194, 204-06 (threatening with Rule 11 sanctions "for this reason and this reason alone": "this appears to be an attack, rightly or wrongly,...that I don't know—on the actions that Justice Lobis took as a sitting justice of the Supreme Court"), 216-17 ("I'm talking Rule 11 because you have brought a complaint against a sitting justice of the Supreme Court")), and sought to intimidate petitioner into withdrawing the action.

Despite the fact that respondents clearly were given fair notice by the complaint of petitioner's claims, as they had

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[1] Citations to "A-" refer to the Appendix below, and citations to "SA-" refer to the Supplemental Appendix below.

acknowledged, Magistrate Judge Peck also threatened petitioner, though he had not even read the complaint, with dismissal under Fed. R. Civ. P. 8. App., *infra*, 82a. (A-216) Thereafter, petitioner informed the court that, despite its attempts at intimidation, he would not withdraw the action, and Magistrate Judge Peck deceptively claimed that petitioner indicated that he would not amend the complaint and, thus, would not be permitted to do so, clearly seeking to set the stage for a dismissal under Rule 8. App., *infra*, 91a.

Petitioner ultimately was permitted to and subsequently did file an Amended Complaint, dated March 22, 2004. (A-31-69) By motion, dated April 30, 2004, the joint defendants, respondents herein, moved for summary judgment dismissing the action. By cross-motion, dated May 21, 2004, petitioner moved for partial summary judgment on his federal law claims and, by motion, dated June 23, 2004, moved for Fed. R. Civ. P. 11 sanctions against respondents and Mr. Hilary Miller, counsel for respondents Burrows and BB&R.

Despite the fact that respondents submitted affirmations of respondent Lobis's law secretary and of Administrative Judge Jacqueline Silbermann, much of which were based on "conversations" with undisclosed third-parties, which attached documents purportedly from actions for which names and index numbers were not provided, and, in the case of Judge Silbermann's affirmation, consisted almost entirely of her opinion as to the law (which conflicts with that of New York State), Magistrate Judge Peck, by order dated May 24, 2004, threatened to disregard petitioner's affidavit, though wholly based on petitioner's personal knowledge and "argued" his case only to the extent that it drew support for his claims and presented opposition to respondents' arguments based on documentary evidence. (A-239-41, 301-21)

Magistrate Judge Peck issued a report and recommendation, dated August 19, 2004 (the "R&R"), App.,

infra, 10a-45a, recommending that the motion for summary judgment of the respondents, dismissing the action, be granted and denial of the motions of petitioner for partial summary judgment and for sanctions (although, inter alia, the motion for sanctions was based, in part, on respondents' assertion of the *Younger* abstention doctrine as a defense to the federal civil rights action for money damages, though case law holds that it is not a defense to an action brought under 42 U.S.C. §1983. *Rivers v. McLeod*, 252 F.3d 99, 101-02 (2d Cir. 2001). With citations to summary orders of the Second Circuit, in violation of Second Circuit Rule §0.23 and not remotely relevant to the issues involved in this action, the R&R recommended dismissal of the claims against respondent Lobis on the grounds, in clear conflict with the decisions of this Court, that a judge on a court of general jurisdiction always is protected by judicial immunity, even were such jurisdiction not invoked. *See infra* Point D. Further, the R&R recommended dismissal of petitioner's claims against the remaining respondents on the grounds that respondent Burrows has quasi-judicial immunity as a court-appointed guardian, though he never was appointed as a guardian by the state court (as respondents conceded), and, in fact, the state court held, against respondent Burrows, in state court, that his role was not that of a guardian but only that of a mediator appointed by petitioner and his ex-wife to assist them to resolve disputes between them concerning the children, and contrary to state law. *See infra* Point B.

On Saturday, September 18, 2004, petitioner received from respondents a request for entry of a judgment for an alleged failure timely to object to the R&R purportedly dated August 19, 2004. Petitioner or petitioner's counsel never had received the R&R, it never had been mailed, as required, by Fed. R. Civ. P. 72(b) and 28 U.S.C. §636(b)(1)(C), to be done forthwith, to the address on the notice of appearance of petitioner's counsel or to any address at which petitioner or his counsel could be found, and the first notice of the R&R,

to petitioner, was the application for entry of a judgment for the alleged failure of petitioner to timely object to the R&R. App., *infra*, 8a; (A-392).[2]

Ultimately, but quite reluctantly, the District Court granted petitioner the right to object to the R&R. App., *infra*, 8a-9a; (A-392).

By order, dated March 23, 2005, the Honorable Jed S. Rakoff adopted the recommendations and reasoning of the R&R but with a mean-spirited, gratuitous statement, without any citation therefor, that petitioner's "objections so entirely misconstrue the law of immunity as to not warrant any further discussion in light of the [R&R's] thorough analysis of the relevant issues." App., *infra*, 9a; (A-391-94). By judgment, entered on April 6, 2005, the action was dismissed with prejudice. App., *infra*, 5a-6a; (A-390).

Judge Rakoff, in an apparent attempt deceptively to bolster his claim concerning petitioner's claim, further improperly adopted the magistrate's change of the caption of the case from being brought against "Joan Lobis," individually, to being against "Justice Joan B. Lobis." *See, e.g.*, App., *infra*, 5a, 7a, 10a, 108a; (A-31, 390-91, 395).

As observed above, the Court of Appeals, by summary order, App., *infra*, 1a-4a, completely rejected the District Court's findings, reasoning, and "thorough analysis," App., *infra*, 9a, with respect to the issue of judicial immunity but affirmed the judgment in favor of respondent Lobis, erroneously, but deliberately, claiming that (a) the state court had retained jurisdiction to enforce the divorce judgment, which plainly was not the case, and the District Court

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[2] The R&R, upon information and belief, quite uncoincidentally came out when petitioner and his counsel were out of state, on vacation, of which respondents were aware. The R&R itself indicates that it was mailed, if at all, to the law firm of Parker Chapin et al., App., *infra*, 11a, at which firm petitioner's counsel had not worked for years, was not his place of his employment, and was not the address appearing on his notice of appearance.

decided the issue accepting, at least for purposes of its holding, that the state court had not retained jurisdiction to enforce the judgment, App., *infra*, 28a ("The Court need not decide the retention of jurisdiction issue"); (A-401), (b) petitioner, as a basis for his claims against respondent Lobis, complains of her actions with respect to two post-judgment motions, when he complained clearly and in particularity about her actions with respect to at least six purported motions all after the divorce action was terminated, *see, e.g.*, A-39-43, 57-59, 109-17, both of which unidentified motions the Court below mischaracterized as enforcement proceedings, App., *infra*, 2a-3a, 116a-123a, which characterization, it held, materially affects the subject-matter jurisdiction of the state trial court, when, without question, they were not enforcement proceedings, and the District Court's finding was that the motions were for reformations, App., *infra*, 28a (issue is "[t]he propriety of the first matrimonial judge deciding subsequent applications to modify a divorce judgment or handle a related proceeding...") (emphasis supplied); (A-401), and (c) that it was unclear whether the divorce judgment resolved all ancillary issues, thus terminating the divorce action, despite the fact that the divorce judgment expressly states that all ancillary issues were resolved, and the respondents and the District Court conceded that the divorce judgment terminated the divorce action. App., *infra*, 112a, 114a; (SA-71 ("The parties settled the ancillary issues of the action by written Stipulation of Settlement dated January 14, 2002"), 77 (incorporating stipulation); A-100 (para. 1), 243 (para. 1), 400-04)

The Court of Appeals also affirmed the judgment in favor of the remaining respondents, finding quasi-judicial immunity, App., *infra*, 3a, contrary to the state court holding adverse to respondent Burrows, App., *infra*, 98a, 105a-106a, contrary to the clear record and admissions also of respondents that Burrows was appointed by the parties to the

divorce action (A-337 (para. 44)), and not by the court, and that his role was that of a mediator to resolve disputes between them concerning the children (A-245 (para. 6)).[3] *See infra* Point B.

Petitioner timely filed a petition for a rehearing. App., *infra*, 116a-128a. Thereafter, the Court of Appeals issued an "amended" summary order, for no apparent reason. App., *infra*, 87a-90a. Petitioner inquired as to the necessity of re-filing a petition for a rehearing, this time addressed to the virtually identical "amended" order. Not ever receiving a response from the court, petitioner, at his cost, timely served and had brought to the office of the clerk of the Court of Appeals, for filing, requisite printed copies of a new petition for a rehearing, addressed to the "amended" order. Only after that did the court below claim, deceptively, that the "amended" order was for the purpose of correcting a typographical error, when the one slight change (changing "two motions" to "several motions"), in response to the petition for a rehearing, cannot reasonably be characterized as such and that it would not accept service of the new petition for a rehearing, because, somehow, the prior petition still was sub judice. Without ever receiving a decision or notice of a decision on the motion for a rehearing, petitioner then received a mandate on the original summary order, App., *infra*, 48a, the "amended" version having been discarded, clearly as extraneous, not having served its purpose of mooting the original petition for a rehearing. Only thereafter, in response to petitioner's inquiry, did he receive an order denying the petition for a rehearing without any decision. App., *infra*, 46a-47a (the order was faxed to petitioner's counsel on March 22, 2006].[4]

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[3] Before the District Court, respondents did not oppose petitioner's motion for partial summary judgment against Burrows and BB&R.

[4] The list of irregularities goes on and on and includes, too, for example, the fact that, while the magistrate continually threatened sanctions,

The Court of Appeals, below, did not, in its denial, without opinion, of petitioner's petition for a rehearing, App., *infra*, 46a-47a, address that petition, at all, because it could not possibly refute that, contrary the court's summary order, petitioner based his civil rights complaint on six well-defined instances of respondent Lobis having acted, on alleged motions, when there was no pending action, in deprivation of petitioner's civil rights, and not two instances, as claimed by the Second Circuit Court of Appeals, and that none was or could have been an enforcement proceeding, the sole basis for the decision of the court below on the issue of judicial immunity. App., *infra*, 116a-123a. Indeed, the holding of the Court of Appeals would require reversal of the District Court's judgment, were the glaring and manifestly purposeful finding of the appellate court, contrary to the record and to the finding of the District Court, that the motions at issue were enforcement proceedings, corrected. *See infra* Point D(3).

Furthermore, as set forth below, the Court of Appeals, here, overruled a clear and unambiguous state court holding by which the state court had held against respondent Burrows on an issue material to the decision of the court below and decided the judicial immunity issue at variance with prior decisions of this Court, Second Circuit precedent, and New York State law on invocation of jurisdiction, while also grossly perverting or ignoring the facts. *See infra* Points B through D.

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dismissal, and disregard of papers filed by petitioner, he never raised an issue as to respondents' submissions which included, in addition to the affirmations they submitted, their S.D.N.Y. Local Rule 56.1 statement (A-161, 239), clearly in violation of the rule, not citing any evidence for statements of facts and also includes the Court of Appeals apparently having granted respondents' application to file a supplementary appendix, opposed by petitioner, *see* Declaration In Opp. To Defendants' Mot. For Leave To File Supp. App., without ever actually ruling on the application.

Based on the entire history of this case, and the conduct of the federal courts here, as set forth above, one must be entirely naïve to believe that these numerous series of attempts resulting in the deprivation of petitioner's rights, without due process of law, were merely a concatenation of coincidences. Presumably, these improper actions can be explained only because petitioner has sued a high profile state court judge, also represented by the influential state attorney general, now seeking office as Governor of New York State, whom she, upon information and belief, enabled to be elected as attorney general, ruling in his favor in a court challenge brought during his campaign for that position.

Furthermore, this case involves deprivations of petitioner's substantial, fundamental, constitutional rights of liberty, as a parent, without due process of law.

This Court must see to it that the federal courts do not give New York State courts a free pass to trample upon litigants' constitutional rights without due process of law by knowingly disregarding the statutory directives for activating its jurisdiction. At the very least, if the judges of the state court deprive a party of his substantial and fundamental constitutional rights, as here, by knowingly acting in the clear absence of jurisdiction, contrary to the requirements of New York statutory law for activating jurisdiction, the federal court, it is submitted, must enforce the pronouncement of this Court, in *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 352 (1871), that "no excuse is permissible."

B. THE COURT OF APPEALS HAD NO SUBJECT-MATTER JURISDICTION TO DECIDE THAT RESPONDENT BURROWS WAS A COURT-APPOINTED GUARDIAN ENTITLED TO QUASI-JUDICIAL IMMUNITY.

The Court of Appeals, in its Opinion, held that respondent Burrows, as a court-appointed guardian, is

entitled to quasi-judicial immunity. App., *infra*, 3a. In so doing, the court below has overturned a state court holding.

The state court's ruling, by respondent Lobis herself, which the Court of Appeals below impermissibly now has overturned, is that respondent Burrows was appointed, not by the state court, but, rather, by petitioner and his ex-wife, in their stipulation incorporated into the divorce judgment ("Judgment"), and not as a true guardian, but, rather, as a mediator, to assist, not the court, but, rather, the parties to the Stipulation. App., *infra*, 98a, 114a; (A-22). Indeed, respondent Lobis, in a portion of an order never appealed from (A-133 n. 6), denying a pre-Judgment motion seeking "an order expanding the authority granted to Mr. Burrows under the Stipulation to the authority of a guardian ad litem," App., *infra*, 95a, 98a; (A-11, 22), held that

> [h]is role cannot be modified, except by an agreement in writing, subscribed and acknowledged by the parties with the same formality as the Stipulation. The parties clearly intended to limit the guardian's role to that of a mediator, who was available to hear those disputes that the parties were unable to resolve on their own, and assist them in resolving them in the best interest of the Children.

App., *infra*, 98a (emphasis supplied); A-22. Denying a motion by respondent Burrows to "clarify" his role, the state court, held once more that "his role and responsibilities are established in the Stipulation" of divorce, agreed to by petitioner and his ex-wife, and that they intended to limit his role to that of a mediator, which role could not be changed without agreement by the parties to the stipulation. App., *infra*, 104a-106a; Exhibit 46 at 4-5.[5]

To be sure, the state court's Judgment provides, too, that the mediator is chosen by the parties thereto, to assist them

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[5] "Exhibit __" refers to an exhibit to petitioner's original complaint.

to resolve disputes between them. App., *infra*, 113a; (SA-72) It is not a court appointment or in aid of the court.

Because respondent Burrows is a "state court loser" on this issue, the Court of Appeals was deprived, by the Rooker-Feldman doctrine, of subject-matter jurisdiction to revisit this issue. *See Exxon Mobil Corp v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005).

The respondents, jointly, also, in their Local Rule 56.1 Statement before the District Court for the Southern District of New York, admitted that petitioner and his ex-wife appointed respondent Burrows and that his role was limited to that of a mediator. (A-337, 245 (para. 6)).

Respondent Burrows has not satisfied his burden of demonstrating an entitlement to immunity, *Dennis v. Sparks*, 449 U.S. 24, 29 (1980), and he clearly was not a court-appointed guardian. Respondents have admitted as much, and, moreover, the state court so held. The Court of Appeals, therefore, lacked subject-matter jurisdiction to overturn that state court holding.

Respondents, despite a state court holding that Burrows was not a guardian or appointed by the court, have asserted below that Burrows acted at all times as a true guardian *ad litem*, Def. Br. at 24, 45 ("all actions taken by ... Burrows were conducted in [his] ... official capacit[y] as ... a guardian ad litem"); Plt. Br. at 23, and the overwhelming documentary evidence is that, acting jointly, respondent Lobis treated him, despite his never having been so appointed, as a true guardian *ad litem*. *See* A-164-65; Plt. Br. at 24 and exhibits cited therein.[6]

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[6] Contrary to the District Court's order, App., *infra*, 7a, there were no "underlying state matrimonial actions," certainly, too, Burrows was not appointed by the state trial court as a guardian in any such action, as claimed by the District Court, *id.*, and, indeed, though respondent Lobis began to treat him as a guardian *ad litem*, after the termination of the matrimonial action, (A-117-34; *see also* A-52-57), he could not then, in any event, have been appointed as a guardian *ad litem*, see N.Y. Civ.

Respondents unquestionably jointly participated to deprive petitioner of his civil rights, treating respondent Burrows as a guardian *ad litem*, for the purpose of denying petitioner his rights to the companionship, care, and management of his children, when Burrows, as held by the state court, was not a court-appointed guardian.

C. THE DECISION OF THE COURT OF APPEALS CONCERNING QUASI JUDICIAL IMMUNITY OF GUARDIANS CONFLICTS WITH STATE COURT DECISIONS.

Further, the decision of the Court of Appeals here conflicts with the two New York State cases relied on by the Court of Appeals in its Opinion. App., *infra*, 3a. *Bluntt v. O'Connor*, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't 2002), was decided on the basis of standing, *see Bluntt*, 291 A.D.2d at 108, 113-15, 119-20; the court, there, specifically, limited its cited *dicta* to legal malpractice suits against guardians "appointed by courts. . . for actions taken within the scope of their appointments." *Id.* at 115-16 (emphasis supplied). Respondent Burrows was not appointed by the court; in any event, this is not a legal malpractice action, and respondent Burrows concededly did not act in the scope of his appointment.

In *Bradt IV v. White*, 190 Misc. 2d 526, 529, 532, 740 N.Y.S.2d 777, 779, 782 (Sup. Ct., Greene Cty. 2002), the court held that immunity does not extend to an intentional tort, 190 Misc. 2d at 535, 740 N.Y.S.2d at 784, and, hence, there could be no basis for finding an immunity from a suit for damages in this Section 1983 action for respondent Burrows's willful joint participation with respondent Lobis.[7]

Prac. L. & R. 1202(a) (appointment of a guardian *ad litem* may only be made in "an action, " where triable), and there never was any order appointed Burrows as a court-appointed guardian.

[7] Furthermore, the decisions of the district courts in the Second Circuit have found that a true guardian is not a state actor and, therefore, could

Respondent Burrows's function could not have been in aid of the court, when he was charged to use his "discretion to assist the parties" to the Stipulation. (SA-10) (emphasis supplied); his sole function, in any judicial proceeding, was to testify as a witness if called by either parent, which is inconsistent with the role of a guardian. (SA-10).

Furthermore, because, as discussed below, respondent Lobis acted in the clear absence of jurisdiction, respondent Burrows could have no immunity for such acts in which he participated.[8]

D. THE DECISION OF THE COURT OF APPEALS ON THE ISSUE OF JUDICIAL IMMUNITY CONFLICTS WITH DECISIONS OF THIS COURT, WITH LEADING SECOND CIRCUIT PRECEDENT, AND WITH STATE LAW.

1. Decisions Of This Court

The clear law, based on precedents of this Court, with respect to judicial immunity, is that, when the statutory

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not be afforded quasi-judicial immunity. *See, e.g.*, the cases cited in R&R n. 13, App., *infra*, 41a-42a; (A-296).

[8] The award of fees to Burrows as a mediator, Opinion at 2 n. 1, App., *infra*, 3a, pursuant to the divorce stipulation, in accordance with which, in federal court, respondents admit Burrows never acted, Def. Br. at 24, 45, is irrelevant and not a component of petitioner's claims. An award of fees to him is relevant only insofar as it is incidental to petitioner's claim that Burrows acted as a phony guardian *ad litem*, in deprivation of petitioner's rights, and that issue never was presented to or decided by the state courts, *see* Plt. Br. at 29; Plt. Reply Br. at 19. Furthermore, contrary to this Court's Opinion at 2 n. 1, App., *infra*, 3a, the issue of jurisdiction relevant herein was not decided by the state courts. The state court held, consistent with the statutory retention of jurisdiction in N.Y. Dom. Rel. L. §244, which applies also to the payment of "any sum of money as required by the [divorce] judgment...or stipulation incorporated by reference in a judgment," including to a third-party, that Burrows was entitled to move for fees provided for in the divorce stipulation; nothing more and nothing less. *See also* Plt. Br. at 6 n. 3.

standards for activating a court's general jurisdiction are not satisfied, and the judge knew or must have known of the jurisdictional defect, no immunity attaches. The Court of Appeals, upon summary affirmance of a District Court order conflicting with this rule of law, though rejecting the reasoning of the lower court, also disregarded this Court's precedents and, indeed, also those in the Second Circuit.

The Court of Appeals disregarded *in toto* the statutory (and case) law for activating jurisdiction in New York State supreme court, ignored completely respondent Lobis's admissions that she acted without subject-matter jurisdiction and had knowledge of such, and blatantly mischaracterized the nature of the "motions" brought before the state court, when no action was pending, finding them, contrary to both the clear record and the finding of the district court, to be enforcement proceedings, when they all were reformations, and even suggested, contrary to the clear and unambiguous language of the divorce judgment and many admissions of respondents, that the divorce judgment did not terminate the divorce action.

In the seminal case of *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 351-52 (1871), this Court set forth the standard for judicial immunity. The Court, in *Bradley*, set forth the distinction between "excess of jurisdiction" and "absence of jurisdiction," for the latter of which, only, will a judge forfeit judicial immunity. The Court explained as follows:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, ***no excuse is permissible***. But where jurisdiction over the subject-matter *is invested by law* in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much

> questions for his determination as any other questions involved in the case, ... [A]lthough [wrongful acts by a judge invested with jurisdiction] would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, ***whenever his general jurisdiction over the subject-matter is invoked.***

Bradley, 80 U.S. at 351-52 (italics, emphasis, and bold-face supplied). Accordingly, the sole question herein, with respect to the acts complained of, against respondent Lobis, should have been whether her "general jurisdiction over the subject-matter [had been] invoked."

This Court's decision in *Stump v. Sparkman*, 435 U.S. 349 (1978), again demonstrates that the determinative factor is whether the state actor's jurisdiction over the subject-matter was activated. There, this Court explained that "the proceeding instituted by the petition placed before him was sufficiently a 'case' under Indiana law to warrant the exercise of his jurisdiction, whether or not he then proceeded to act erroneously." 435 U.S. 363 n. 12 (emphasis supplied). *See also id.* at 364 ("Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization") (emphasis supplied). The state actor's general jurisdiction over the subject-matter, in that case, was activated or "invoked," according to the state's statutory law, by the filing of papers that commenced or instituted an action.

2. Other Second Circuit Decisions

Similarly, the Second Circuit Court of Appeals, in *Tucker v. Outwater*, 118 F.3d 930 (2d Cir.), *cert. denied*, 522 U.S. 997 (1997), following those precedents, held that the applicable New York statutes, there, "authorized Justice Outwater to exercise jurisdiction over plaintiff . . .," 118 F.3d at 935 (emphasis supplied), and, accordingly, the defendant's jurisdiction over the subject-matter had been activated, and the defendant state actor was cloaked with judicial immunity.

The Second Circuit Court of Appeals, in *Tucker v. Outwater*, *supra*, expressly distinguished that case from its prior decision in *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989), which, as explained in *Tucker*, *supra*, also "turned on the requirements of New York" statutes, 118 F.2d at 934. Because, in *Maestri*, the statutory requirements necessary for activating subject-matter jurisdiction were not satisfied, the judge acted in the clear absence of jurisdiction, and, the court found, he knew it.

In *Maestri, supra*, citing *Bradley*, thus the Court of Appeals held that, "[w]hen a judge clearly lacks jurisdiction over the subject matter, 'any authority exercised is a usurped authority,'" and such judge will be denied immunity. *Maestri*, 860 F.2d at 52-53 (citation omitted).

> Accordingly, the test for immunity,
> composed both of an objective element—that jurisdiction is clearly absent, *i.e.*, that no reasonable judge would have thought jurisdiction proper—and of a subjective element—that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect—protects judicial acts from hindsight examination while permitting redress in more egregious cases, . . .

Maestri, 860 F.2d at 53, such as in *Maestri* and here. In *Maestri*, as here, the statutory requirements, of the New York State laws, for activating the subject-matter jurisdiction of the court were not satisfied.

3. The Decision Below and State Law

With respect to respondent Lobis, the decision of the Court of Appeals below rests its findings on the grounds that (a) the state court retained jurisdiction for the purpose of enforcement and (b) that plaintiff complains of alleged deprivations of his "constitutional rights through Lobis's adjudication of two motions, which Lewittes contends Lobis

lacked jurisdiction to decide," both of which, the Court of Appeals found (without identifying these motions) were enforcement proceedings. App., *infra*, 2a-3a.

In fact, the Amended Complaint in this action complains of Lobis's purported adjudication of more than six alleged motions (A-39-40, 47, 57-58, 61-63; *see also* A-103, 110-17, 252), all after the matrimonial action was terminated by the Judgment; even though one of those "motions" ostensibly and purposely was constructed to appear that it was seeking to enforce the Judgment, all, and certainly at least virtually all, clearly and indisputably cannot be construed as being in the nature of enforcement. App., *infra*, 116a-123a;(A-110-17).

Rather, the state court proceedings were for reformations, and, accordingly, the District Court, indeed, decided the issue of immunity on the basis of "[t]he propriety of the first matrimonial judge deciding subsequent applications to modify a divorce judgment or handle related proceedings...."App., *infra*, 28a(emphasis supplied);(A-410).

For example, the various orders and rulings of respondent Lobis arising from false allegations of sexual abuse, against petitioner, made by his ex-wife ("Blume"), all substantial bases for this civil rights action against respondent Lobis, first suspending all of petitioner's access to his children, then imposing supervised visitation, followed by onerous restrictions on his access, as a condition to seeing his children, including, too, the January 27, 2003, order to show cause, also awarding Blume costs against petitioner in connection with Blume's false allegations of sexual abuse (A-39-40, 57-59, 114-16), certainly could not, in any way, shape, or form, be an enforcement proceeding. Clearly, respondent Lobis deprived petitioner of his constitutional rights as a parent in the absence of subject-matter jurisdiction.

"An action must have inception...before the court can have any jurisdiction in it." *Schram v. Keane*, 279 N.Y. 227,

234 (1938). In New York, "[a]n action is commenced by filing a summons and complaint or summons with notice." N.Y. Civ. Prac. L. & R. 304. No summons or petition was filed with respect to any matter that is a basis for the instant civil rights action against respondent Lobis, and no filing fee was paid. *See id.* [9]

Thus, the "nonfiling" of the papers necessary to commence an action is a non-waivable, jurisdictional defect. *Sangiacomo v. County of Albany*, 302 A.D.2d 769, 771 (3d Dep't 2003). "Under the circumstances here," where no summons with notice or complaint ever was filed or even attempted after the termination of the matrimonial action, "to wit, a nonfiling, the subject matter jurisdiction of the court has not been invoked resulting in a nonwaivable defect." *Id.* (emphasis supplied). Clearly, with respect to each act complained of herein against respondent Lobis, the court's jurisdiction never was activated, resulting, under the holdings of *Bradley*, *supra*, *Stump*, *supra*, *Maestri*, *supra*, and *Tucker*, *supra*, not in a mere "excess of jurisdiction," which is the case only "whenever [the court's] general jurisdiction over the subject-matter is invoked," *Bradley*, 80 U.S. at 352, but, rather, a clear absence of jurisdiction.

Even if emergency measures are required, before a summons with notice or complaint may be filed, filing of such papers within five days of an order to show cause is required to commence an action and, thus, for the subject-matter jurisdiction of a court to be activated. N.Y. Civ. Prac. L. & R. 304. Here, none of respondent Lobis's "orders" that form the bases for this civil rights action against Lobis, including with respect to the false allegations of sexual abuse, ever required filing of a summons, and none was filed; accordingly, no action ever was commenced, and

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[9] For all of the motions, in the context of which Lobis's acts are herein complained of, the index number of the terminated matrimonial action was used.

respondent Lobis or her court never acquired jurisdiction. *See Schram v. Keane*, 279 N.Y. at 232-34 (when a provisional remedy is authorized prior to filing [or, under prior law, the serving] of a summons, "jurisdiction thus acquired is conditional, and liable to be divested" upon a failure to comply with the statutory condition). Respondent Lobis never even ordered the filing of a summons and, thus, never even acquired conditional subject-matter jurisdiction. She clearly, at all times relevant hereto, acted in the clear absence of jurisdiction.

Even assuming, *arguendo* only, that the Judgment in fact "explicitly retained jurisdiction for purposes of enforcement," App., *infra*, 3a, though no such retention of jurisdiction was found by the District Court or exists), because respondent Lobis entertained motions that were not to enforce the Judgment, all after the action had been terminated, without a new action, upon the purchase of a new index number, ever having been commenced, *see* Plt. Br. at 8-21; Plt. Reply Br. at 1-5, by the express terms of the Opinion of the Court of Appeals below, respondent Lobis undeniably acted in the clear absence of subject-matter jurisdiction.

Furthermore, there was no retention of jurisdiction, set forth in the Judgment, for purposes of enforcement. The language employed therein (SA-77) is but "an acknowledgement of concurrency of jurisdiction," *Dillon v. Dillon*, 116 Misc. 2d 53, 455 N.Y.S.2d 68, 70 (Fam. Ct., Allegany Cty. 1982) *Cf. Green v. Green*, 50 A.D.2d 235, 236, 377 N.Y.S.2d 675 (3d Dep't 1975). It has nothing to do with the activation of such jurisdiction. In *Renzulli v. McElrath*, 185 Misc. 2d 242, 712 N.Y.S.2d 267 (Sup Ct., Richmond Cty. 2000), *aff'd*, 286 A.D.2d 335 (2d Dep't 2001), the court noted that the very same operative language is intended only "to give notice to attorneys and litigants of the court's policy of concurrent jurisdiction with the Family Court." *Renzulli*, 712 N.Y.S.2d at 273 n. 3. It does not serve

to or state that it retains jurisdiction for the court to entertain a motion when no action is pending.*See* Plt. Reply Br. at 6-8.

To the extent the Court of Appeals relied on *Luisi v. Luisi*, 6 A.D.3d 398 (2d Dep't 2004), the sole authority cited by that Court in support of its holding that respondent "Lobis did not act in the clear absence of jurisdiction," App., *infra*, 3a, its reliance is entirely misplaced. First, that case expressly held that a court may not reform the parties' stipulation, incorporated into the divorce judgment, other than by plenary action. 6 A.D.3d at 401. Here, respondent Lobis decided motions to reform the Judgment and stipulation incorporated therein, in the absence of a plenary action. In so doing, she acted in the clear absence of jurisdiction.

Furthermore, unlike here, that was a case in which a former spouse clearly was proceeding under an express statutory retention of jurisdiction, which expressly permits the court to entertain a motion to enforce the support provisions of a divorce judgment or of a stipulation incorporated therein.[10] As set forth in *Fishkin v. Fishkin*, 201 A.D.2d 202, 207 (2d Dep't 1994), another New York Second Department case, relied in its decision in *Luisi*, *supra*, cited in the Opinion, a stipulation incorporated into a divorce judgment is "enforceable by way of a motion pursuant to Domestic Relations Law § 244." That statutory provision, a statutory retention of jurisdiction, is one of but three exceptions, *see supra* note 10, other than a contempt proceeding or by execution, to the inflexible rule, in New York, that, after the termination of an action, a court lacks subject-matter jurisdiction to entertain any motion, and a party must proceed by filing a new action, under a new index number. *See, e.g., Fox v. Fox*, 263 N.Y. 68, 70-71, 188 N.E. 160, 160-61 (1933); *see also In the Matter of Solkav*

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[10] Such provisions, *all of which relate solely to spousal or child support and awards of moneys in divorce judgments*, are found in N.Y. Dom. Rel. L. §236(9)(b); §240(1)(j); §244.

Solartechnik, G.m.b.H.[Besicorp Group], 91 N.Y.2d 482, 672 N.Y.S.2d 838, 695 N.E.2d 707 (1998); *Murphy v. Murphy*, 24 A.D.3d 330, 807 N.Y.S.2d 28 (1st Dep't 2005), affirming an order of respondent Lobis, holding that "Given the pendency of this matrimonial action in which no judgment of divorce has been entered, defendant was not required to institute a separate plenary action to seek enforcement of the parties' separation agreement" (emphasis supplied and citations omitted); *In the Matter of Carmen Crespo*, 123 Misc.2d 862, 864, 475 N.Y.S.2d 319 (Sup. Ct., N.Y. Cty. 1984). *Accord Wheelock v. Wheelock*, 3 A.D.2d 25, 27 (1st Dep't 1956), *aff'd*, 4 N.Y.2d 706 (1958); Practice Commentaries, McKinney's Consolidated Laws of New York Annotated, §244 ("Absent DRL § 244, a plenary action would be required to obtain an enforceable money judgment" based on non-payment of support provided by a divorce judgment or a stipulation incorporated therein) (1999) (Alan D. Scheinkman).

The remaining statutory authority for the New York supreme court to enforce a judgment, other than the three statutory retentions of jurisdiction cited above and other than by commencement of a plenary action or by execution, is by a contempt proceeding. *See* N.Y. Civ. Prac. L. & R. 5104; N.Y. Dom. Rel. L. §245. None of the rulings of respondent Lobis, the effect of which is a basis for this civil rights action against her, was a ruling in a contempt proceeding.

It is undisputed that none of the rulings of Lobis, the consequence of which is a basis for the present action for damages against her, falls under any of the statutory reservations of jurisdiction, which relate solely to support and awards of money set forth in a divorce judgment. To be sure, the Opinion does not identify any statutory authority for respondent Lobis's exercise of jurisdiction with respect to the acts complained of herein, after a judgment of divorce, though the question of whether she acted in clear absence of jurisdiction turns on the requirements of New York statutes.

Tucker v. Outwater, 118 F.3d 930, 934-35 (2d Cir.), *cert denied*, 522 U.S. 997 (1997); *Maestri v. Jutkofsky*, 860 F.2d 50 (2d Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989).

Moreover, because respondent Lobis decided motions under the facts presented here, that were not, under any reasonable and fair interpretation, in the nature of an enforcement, without a plenary action having been commenced, she, even according to the reasoning of the Court of Appeals, acted in the clear absence of jurisdiction.

4. Lobis's Subjective Knowledge

To be sure, in respondent Lobis's decision, dated November 1, 2002, App.,*infra*, 93a-96a (excerpted), which included a final disposition of the August 22, 2002, motion, which was motion sequence no. 007 before her, as well as of the May 2, 2002, pre-judgment motion of Blume, with petitioner's June 11, 2002, pre-judgment cross-motion, collectively motion sequence no. 005, *see* App., *infra*, 93a-94a, 114a; (A-10, 11, 77), respondent Lobis wrote this in the very opening of her decision and order:

> The parties entered into a stipulation of settlement in January 2002 (the "Stipulation"), which was incorporated but not merged into the parties' judgment of divorce, dated August 19, 2002 (the "Judgment"). The Judgment was signed while one of the instant motions was sub judice [motion sequence no. 005 was submitted on August 8, 2002, *accord* (A-77)] ***and while the other was awaiting the submission of additional papers.***

App., *infra*, 97a (bold face and italics supplied); (A-12). The "other" motion—the August 22, 2002, motion—was brought by order to show cause, signed by respondent Lobis, three days *after* she signed the Judgment and was not "awaiting the submission of additional papers" when "[t]he Judgment was signed." *See* Exhibits 1 and 2. Indeed, the affirmation

of Marilyn Sugarman, respondent Lobis's law secretary, submitted by respondents jointly, confirms, as demonstrated by the undisputed documentary evidence herein, that respondent Lobis's statement in her decision plainly was false. App., *infra*, 11a; (A-77-79). *See* Exhibits 1, 2; (A-78-79, 112-13).

By her having signed the Judgment three days before signing the order to show cause and also by the papers and statements made by petitioner, Exhibits 2, 5, 6, 7, having pointed out to respondent Lobis such clear jurisdictional defect, respondent Lobis must have known of the non-existence of jurisdiction. In fact, moreover, based on undisputed documentary evidence, ***she knew it***, as indicated by the plain false statement of Lobis in her November 1, 2002, decision, App., *infra*, 97a; (A-12), that both (a) acknowledges that, for her to have acquired subject-matter jurisdiction over the motion, it must have been made prior to the Judgment having been signed and (b) clearly misstates the chronology. Of course, at all later times, she, too, necessarily knew of the non-waivable jurisdictional defect.

Indeed, later, with respect to her September 24, 2003, order to show cause, Exhibit 47, expressly acknowledging her knowledge of the issue of subject-matter jurisdiction, respondent Lobis, in her January 12, 2004, decision and order, denied petitioner's "request to dismiss this application for lack of [subject-matter] jurisdiction," stating, incredibly, that the non-waivable jurisdictional issue, a threshold issue in any litigation, was "not set forth in the notice of cross motion" and, therefore, was "not properly before this court." (A-140) *See also* Plt. Mem. In Support Of Partial Summary Judgment at 15; Exhibit 47.

Petitioner, all along, has maintained, and also has demonstrated, that this is that "rare case," like in *Maestri*, where the defendant judge did act in the clear absence of jurisdiction and knew it. *See, e.g.*, App., *infra*, 67a; (A-194-95). Respondent Lobis had no judicial authority to act; as

such, she knowingly, necessarily deprived petitioner of his federal civil rights in violation of 42 U.S.C §1983. She, thus, acting under color of state law, but in the clear absence of jurisdiction, clearly is liable to petitioner for damages.

As in *Maestri*, this is that egregious case in which the doctrine of judicial immunity, protecting judges, acting in the exercise of their jurisdiction, from hindsight does not apply. *Maestri*, 860 F.2d at 52-53. Rather, it "is the kind of clear judicial usurpation which cannot be condoned by any grant of immunity." *Id.* at 53. *Accord Bradley*, 80 U.S. at 352 ("when the want of jurisdiction is known to the judge, no excuse is permissible") (emphasis supplied).

5. Further Misrepresentations

Lastly, with respect to respondent Lobis, the Opinion below, found, as well, expressly as a basis for holding that she is entitled to judicial immunity, that "Lobis's orders were also in compliance with the New York Supreme Court's Operation Manual, which makes it clear that a matrimonial matter is not marked disposed until both the judgment of divorce is granted and all ancillary issues are decided." App., *infra*, 112a. While "the provisions of the Civil Practice Law and Rules obviously take precedence over any rules of the court," *Brooks v. Hausauer*, 51 A.D.2d 660, 662, 379 N.Y.S.2d 306 (4th Dep't 1976), and Administrative Judge Silbermann, thus, by her manual, may not confer subject-matter jurisdiction upon defendant Lobis's court where it does not exist by statute, what the lower court's Opinion cites from the operation manual is consistent with New York law. A judgment, under New York law, is final when it disposes of all of the causes of action between the parties. *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995).

Here, the matrimonial matter should have been marked "disposed" on August 19, 2002, when the Judgment was signed. To be sure, as is evident from the subsequent decretal paragraphs in the Judgment, excerpted in the

appendix, *infra*, and has never been disputed here, the Judgment expressly sets forth that "[t]he parties settled the ancillary issues of the action by written Stipulation dated January 14, 2002," which Stipulation was incorporated into the Judgment. App., *infra*, 112a-114a; (SA-71, 77). This is diametrically opposed to one of the holdings of the Court below. App., *infra*, 3a.

Thus, once more, by the very terms of the Opinion, it is clear that the action was terminated, by the Judgment, on August 19, 2002, as conceded also by respondents and by the District Court. (A-100, 162, 243 (paragraph 1)); App., *infra*, 24a-37a; (A-400-04)); *see also* N.Y. Civ. Prac. L. & R. 105(p). All ancillary issues having been decided by the Judgment, respondent Lobis incontestably was bereft of all subject-matter jurisdiction to act, absent the commencement of a plenary action, upon the purchase of a new index number. *See* Plt. Br. at 8-21; Plt. Reply Br. at 1-10; *see also* A-162. Not only did respondent Lobis know that a plenary action was required for her to decide such motions, and that there was no new filing, but also she even misrepresented facts to cover up her lack of subject-matter jurisdiction. Under these circumstances, she cannot, consistent with the decisions of this Court, be cloaked with judicial immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
JOEL LEWITTES
Counsel of Record
1125 Park Avenue
New York, New York 10128
(516) 393-8254

Counsel for Petitioner

June 1, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STATE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSE OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held a the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th day of December, two thousand and five.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. PIERRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges,

DAVID I. LEWITTES,

Plaintiff-Appellant,

No. 05-2219

-v-

JOAN LOBIS, KENNETH DAVID BURROWS, BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants-Appellees.

Appearing for Appellant:	JOEL LEWITTES, New York, NY.
Appearing for Appellee	PATRICK J. WALSH, Assistant Solicitor General (Michael S. Belohlavek, Senior Counsel, Division of Appeals and Opinions, ELIOT SPITZER, Attorney General of the State of New York, of counsel), New York, NY for defendant-appellee Joan Lobis HILLARY B. MILLER, Greenwich, CT for defendants-appellees Kenneth David Burrows and Bender, Burrows & Rosenthal, L.L.P.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed. S. Rakoff, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is AFFIRMED.

Lewittes asserts the instant claim against Lobis, Burrows, and Burrows's law firm for conspiring or acting jointly to deny Lewittes's constitutional rights through Lobis's adjudication of two motions, which Lewittes contends Lobis lacked jurisdiction to decide.

A state court judge is not subject to a suit for damages for actions relating to the exercise of his or her

judicial functions, unless the judge acted in the clear absence of jurisdiction. Mireles v. Waco, 502 U.S. 9, 9-10 (1991) (per curiam). We think it clear in this case that Lobis did not act in the clear absence of jurisdiction. See, Luisi v. Luisi, 6 A.D.3d 398, 400 (2d Dep't 2004) ("The defendant was not required to institute a plenary action, as he was seeking to enforce, rather than to modify the terms of the parties' stipulation of settlement which was incorporated but not merged in the judgment of divorce."). In this case, the court's August 19 Judgment of Divorce explicitly retained jurisdiction for purposes of enforcement. Lobis's orders were also in compliance with the New York Supreme Court's Operation Manual, which makes clear that a matrimonial matter is not marked disposed until both the judgment of divorce is granted and all ancillary issues are decided.[1] Lobis is therefore entitled to absolute immunity.

Similarly, whether as a "law guardian" or guardian ad litem, Burrows and his firm are also entitled to quasi-judicial immunity. See Bluntt v. O'Connor, 291 A.D.2d 106, 108, 737 N.Y.S.2d 471, 472-73 (4th Dep't 2002); Bradt v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct. Greene Co. 2002).

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[1]We also note that the New York courts have already decided that Lobis's award of Burrows's fees was proper. See Lewittes v. Lewittes, 2 A.D.3d 295, 296, 770 N.Y.S.2d 297, 298-99 1st Dep't 2003). Because the issue of jurisdiction was "actually and necessarily decided" in that proceeding and Lewittes was afforded a "full and fair opportunity" to litigate there, he is estopped Cohen v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995).

Finally, because the Defendants have not raised frivolous defenses, the District Court properly denied Plaintiff's motion for sanctions.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

s/
By:

U.S. DISTRICT COURT
FILED
APR 6 2005
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DAVID I. LEWITTES,

Plaintiff,

-against-

JUSTICE JOAN B. LOBIS, KENNETH DAVID BURROWS, and BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants.

----------X

04 **CIVIL** 0155 (JSR)

JUDGMENT

Whereas on August 19, 2004, the Honorable Andrew J. Peck, United States Magistrate Judge, having issued a Report and Recommendation (the "report") recommending that defendant's summary judgment motion be granted, and the matter having come before the Honorable Jed S. Rakoff, United States District Judge, and the Court, on March 23, 2005, having rendered its Order granting defendants' motion for summary judgment, denying plaintiff's motions for partial summary judgment and for Rule 11 sanctions, and dismissing the action with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated March 23, 2004, defendants' motion for summary judgment is granted;

plaintiff's motions for partial summary judgment and for Rule 11 sanctions are denied; and the action is dismissed with prejudice.

Dated: New York, New York
April 6, 2005

J. MICHAEL McMAHON

Clerk of the Court

By: s/_____
Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 4/6/05

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DAVID I. LEWITTES,

Plaintiff

-v-

JUSTICE JOAN B. LOBIS, KENNETH DAVID BURROWS, and BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants.

----------x

ORDER

04 Civ. 0155 (JSR)

JED S. RAKOFF, U.S.D.J.

On August 19, 2004, the Honorable Andrew J. Peck, United States Chief Magistrate Judge, issued a Report and Recommendation ("Report") in the above-captioned case recommending that defendants' summary judgment motion should be granted on the grounds that defendant Joan B. Lobis is entitled to absolute judicial immunity and defendants Burrows and Bender, Burrows & Rosenthal are entitled to quasi-judicial immunity for their role as court-appointed guardian in the underlying state matrimonial actions that gave rise to plaintiff's instant civil rights action. The Report also disposed of plaintiff's motion for partial summary judgment and for Rule 11 sanctions, finding plaintiff's arguments meritless.[1] Not having received any objections from the plaintiff by September 15, 2004 - well past the

[1] By memo endorsement dated July 12, 2004, Chief Magistrate Judge Peck had previously granted defendants' request to defer a response to plaintiff's second motion for Rule 11 sanctions, which the Report, if adopted, would in any event render moot.

ten-day deadline for such objections pursuant to 28 U.S.C. § 636 (b) (1) and Rule 72(b) of the Federal Rules of Civil Procedure - defendants submitted to this Court a joint request for entry of judgment, a copy of which it served on plaintiff's counsel (the father of the plaintiff, who himself is a non-practicing attorney).

By letter dated September 19, 2004, plaintiff's counsel wrote to Chief Magistrate Judge Peck stating that he had never received the Report, asserting that the Report "was not mailed to plaintiff," and "demand[ing]" that the Report be mailed to him immediately and that the plaintiff be given ten days to object. Chief Magistrate Judge Peck memo endorsed this letter on September 20, 2004, noting that "the Court finds the tone of [counsel's] letter to be offensive," explaining that the Report was mailed to the address that plaintiff's counsel had provided at his appearance and that plaintiff's counsel was in any event responsible for following the docket sheet, ordering plaintiff's counsel to show cause in writing as to why the address he now provided as his business address was the same as the plaintiff's home address, and advising that any request for an extension of time to object to the Report must come from this Court rather than from Chief Magistrate Judge Peck.

By letter dated September 20, 2004, plaintiff's counsel stated that he "did not wish to seem to be offensive," took issue with Chief Magistrate Judge Peck's claim to have mailed the Report to his current law firm, explained that he was handling his son's litigation on a private basis out of his home, and requested that Chief Magistrate Judge Peck forward to this Court the September 20 letter. Chief Magistrate Judge Peck again memo endorsed this letter, also on September 20, 2004, reaffirming that the Report was sent to plaintiff's counsel's current law firm and reminding him that any request for an extension of time to file objections must come from this Court.

In response to a telephone call from all counsel on September 21, 2004, this Court granted plaintiff's request (on which defendants took no position) for an extension of the time to file objections until September 31, 2004. Plaintiff, by his attorney, subsequently submitted objections dated September 28, 2004, to which defendants responded on October 7, 2004.[2] Accordingly, the Court has considered the underlying motions and voluminous record de novo.

Having done so, the Court finds itself in complete agreement with Chief Magistrate Judge Peck's excellent Report and hereby adopts it by reference. Plaintiff's objections so entirely misconstrue the law of immunity as to not warrant any further discussion in light of the Report's thorough analysis of the relevant issues.

Accordingly, the defendants' motion for summary judgment is hereby granted, and plaintiff's motions for partial summary judgment and for Rule 11 sanctions are denied. This Order disposes of all pending motions in this action, which is hereby dismissed with prejudice. Clerk to enter judgment.

SO ORDERED.

S/_____
Jed S. Rakoff, U.S.D.J.

Dated: New York, New York
March 23, 2005

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[2] Defendants thereafter also provided a Notice of Supplemental Authority dated December 20, 2004, providing a copy of a decision of the Supreme Court of New York, Appellate Division, First Department, upholding an order of Justice Lobis in plaintiff's matrimonial action against his ex-wife.

DAVID I. LEWITTES,

Plaintiff,

-against-

JUSTICE JOAN B. LOBIS, KENNETH DAVID BURROWS, and BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants.

04 Civ. 0155 (JSR) (AJP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 16320

August 19, 2004, Decided

PRIOR HISTORY: Lewittes v. Lewittes, 2 A.D.Sd 295, 770 N.Y.S.2d 297, 2003 N.Y. App. Div. LEXIS 13601 (N.Y. App. Div. 1st Dep't, 2003)

DISPOSITION: Summary judgment for defendants recommended.

LexisNexis(R) Headnotes

COUNSEL: [*1] For Plaintiff: David I. Lewittes, Pro se, New York, NY; Joel Lewittes, Parker, Chapin, et al., New York, NY. For Defendants: Hilary B. Miller, Law Office of Hilary B. Miller, Greenwich, CT.

JUDGES: Andrew J. Peck, United States Chief Magistrate Judge. Honorable Jed S. Rakoff, United States District Judge.

OPINION BY: ANDREW J. PECK

OPINION: REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Chief Magistrate Judge:

To the Honorable Jed S. Rakoff, United States District Judge:

Plaintiff David Lewittes brings this action against New York State Supreme Court Justice Joan Lobis, Kenneth David Burrows, and Burrows' law firm, Bender Burrows & Rosenthal, L.L.P. ("BBR"), pursuant to 42 U.S.C. § 1983. (Dkt. No. 15: Amended Compl.) nl Presently before this Court is defendants' summary judgment motion and plaintiffs cross motion for partial summary judgment. (Dkt. Nos. 21-23, 26-31, 34-37.) For the reasons set forth below, the Court should grant summary judgment in favor of all defendants.

nl Plaintiff Lewittes' original complaint, filed "pro se" (although he is a non-practicing attorney) before his father appeared to represent him, was extremely prolix, running to 373 paragraphs covering 181 pages. (Dkt. No. 1: Compl.)

[*2]

FACTS

Lewittes' Allegations Against Defendant Lobis

In 2002, Justice Lobis presided over a matrimonial action for divorce between Lewittes and his ex-wife, Marilyn Blume. (Dkt. No. 15: Am. Compl. P. 8.) Lobis signed a judgment terminating the matrimonial action on August 19, 2002. (Am. Compl. P 9) Three days later, Blume brought an applicaton before Justice Lobis by order to show cause, which Justice Lobis signed. (Am. Compl. PP 10-11.) According to Lewittes, the order "deprived [Lewittes] of his rights, privileges, and immunities under the Constitution and laws in that it, in the absence of due process, deprived plaintiff of his right to liberty, specifically the right of companionship, care and management of his children, as a parent, and also, without due process of law, deprived plaintiff of his property right and his right to equal protection under the law": (Am. Compl. P. 19) n2

> n2 According to Lewittes, Justice Lobis prohibited him from visiting his children at school or elsewhere" and "suspended all of [Lewittes'] access to his children upon Blume's plainly false and contrived allegations of sexual abuse by plaintiff." (Am Compl. PP 25-26)

[*3]

Lewittes acknowledges the legal doctrine that judges have absolute immunity from civil suits, but Lewittes argues that Justice Lobis is not immune from this suit because, by entertaining Blume's application three days after termination of the matrimonial action, she was acting in the "clear

absence of jurisdiction." (Am. Compl. PP 6, 11.) Lewittes asserts that "a judge is denied immunity when the judge has acted in the clear absence of jurisdiction and must have known that he was acting in the clear absence of jurisdiction." (Am. Compl. P.6.) Lewittes argues that "three days after Lobis signed the Judgment terminating the matrimonial action, there was no action between Blume and {Lewittes]. Blume never commenced a new action.... There, accordingly, was a clear absence of jurisdiction, and any judge, having, three days earlier, signed a judgment terminating the action, must have known that there was a clear lack of subject-matter jurisdiction. (Am. Compl. PP 12-13.)

Lewitte's Allegations Against Defendants Burrows and BBR

Lewittes' amended complaint seeks damages from Burrows as "a co-conspirator or through joint efforts with Lobis, both for such deprivations [*4] for which Lobis has no judicial immunity and for deprivations for which Lobis herself has immunity from a suit for damages. Damages from BB&R are sought arising from Burrow's actions as a member of that firm, from in or about May 2003 to date."(Am.Compl. P 20.) Specifically Lewittes challenges Justice Lobis' orders that he pay Burrows' fees as guardian ad litem for Lewittes's children. (Am Compl. PP 7-31, 34-39) n. 3

> n. 3 Lewittes' divorce has spawned other "collateral" litigation. (See Dkt. No. 22: Defs. Br. At 23.) For example, Lewittes' brother, Michael, sued Blume (and her brother) for defamation and trademark infringement for alleging on their website, www.lewittes.com, that Michael is homosexual. See Lewittes v. Cohen, 2004 U.S.

Dist. LEXIS 9467, 03 Civ, 189, 2004 WL 1171261 (S.D.N.Y. May 26, 2004.)

ANALYSIS

I. SUMMARY JUDGMENT STANDARDS IN SECTION 1983 CASES n.4

n4 For additional decisions authored by this Judge discussing the summary judgment standards in Section 1983 cases, in language substantially similar to that in this entire section of this Report and Recommendation, see, e.g., Nonnenmann v. City of New York, 2004 U.S. Dist. LEXIS 8966, 02 Civ. 10131, 2004 WL 1119648 at * 11-13 (S.D.N.Y. May 20, 2004) (Peck, M.J.); Hall v. Perilli, 2004 U.S. Dist. LEXIS 8397, 03 Civ. 4635, 2004 WL 1068045 at *3-4 (S.D.N.Y. May 13, 2004) (Peck, M.J.); Baker v. Welch, 2003 U.S. Dist. LEXIS 22059, 03 Civ. 2267, 2003 WL 22901051 at *4-6 (S.D.N.Y. Dec. 10, 2003) (Peck, M.J.) (citing my earlier decisions); Salahuddin v. Coughlin, 999 F. Supp. 526, 534 (S.D.N.Y. 1998) (Rakoff, D.J. & Peck, M.J.).

[*5]

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); Lang v. Retirement Living Pub. Co., 949 F.2d 576, 580 (2d Cir. 1991).

The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment - here, defendants. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 36 (2d Cir. 1994); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1223 (2d Cir. 1994). [*6] The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on an issue on which the non-movant has the burden of proof. See, e.g., Celotex Corp. v. Catrett, 477 U.S. at 323, 106 S. Ct. at 2552-53.

To defeat a summary judgment motion, the non-moving party must do "more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Instead, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); accord, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587, 106 S. Ct. at 1356.

In evaluating the record to determine whether there is a genuine issue as to any material fact, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513; see also [*7] , e.g., Chambers v. TRM Copy Ctrs. Corp., 43 F.3d at 36; Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d at 1223. The Court draws all inferences in favor of the nonmoving party - here, Lewittes - only after determining that such

inferences are reasonable, considering all the evidence presented. See, e.g., Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir.), cert, denied, 484 U.S. 977, 108 S. Ct. 489, 98 L. Ed. 2d 487 (1987). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." Chambers v. TRM Copy Ctrs. Corp., 43 F.3d at 37.

In considering a motion for summary judgment, the Court is not to resolve contested issues of fact, but rather is to determine whether there exists any disputed issue of material fact. See, e.g., Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), [*8] cert, denied, 480 U.S. 932, 107 S. Ct. 1570, 94 L. Ed. 2d 762 (1987). To evaluate a fact's materiality, the substantive law determines which facts are critical and which facts are irrelevant. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. at 248, 106 S. Ct. at 2510. While "disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment[,] factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248, 106 S. Ct. at 2510 (citations omitted); see also, e.g., Knight v. United States Fire Ins. Co., 804 F.2d at 11-12.

II. THE DOCTRINE OF ABSOLUTE IMMUNITY FOR STATE COURT JUDGES

The common law rule of absolute judicial immunity protects judges from civil damage suits under § 1983 relating to the exercise of their judicial functions. E.g., Mireles v. Waco, 502 U.S. 9, 9-12, 112 S. Ct. 286, 287-88, 116 L. Ed. 2d 9 (1991) ("A long line of this Court's precedents

acknowledges that, generally, a judge is immune from a suit for money damages."); Stump v. Sparkman, 435 U.S. 349, 355-56, 98 S. Ct. 1099, 1104, 55 L. Ed. 2d 331 (1978) [*9] ("The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' For that reason, the Court held that 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' Later, we held that this doctrine of judicial immunity was applicable in suits under ... 42 U.S.C. § 1983, for the legislative record gives no indication Congress intended to abolish this long-established principle.") (citations & fhs. omitted); Pierson v. Ray, 386 U.S. 547, 553-55, 87 S. Ct. 1213, 1217-18, 18 L. Ed. 2d 288 (1967) ("Few doctrines were far more solidly established at common law than the immunity of judges from liability for damages for acts committed within their [*10] judicial jurisdiction," and this doctrine was not abolished by § 1983); D'amato v. Rattoballi, No. 03H 7539, 83 Fed. Appx. 359, 360, 2003 WL 22955858 at *1 (2d Cir. Dec. 8, 2003) ("It is well-established that a judge is entitled to absolute immunity from liability for damages under section 1983 for actions performed in her judicial capacity, and that the judge 'will not be deprived of immunity [even] if the action [she] took was in error, was done maliciously, or was in excess of [her] authority.'"); Carley v. Lawrence, No. 01-7315, 24 Fed. Appx. 66, 67, 2001 WL 1486227 at *1 (2d Cir. Nov. 20, 2001) ("This Court has held that a judge is entitled to absolute immunity from liability for damages under § 1983 for actions performed in his judicial capacity."); Montero v.

Travis, 171 F.3d 757, 760 (2d Cir. 1999) ("It is... well established that officials acting in a judicial capacity are entitled to absolute immunity against § 1983 actions, and this immunity acts as a complete shield to claims for money damages."); Tucker v. Cutwater, 118 F.3d 930, 933 (2d Cir. ("Since the seventeenth century, the common law [*11] has immunized judges from damage claims arising out of their judicial acts.... The Supreme Court has specifically applied the doctrine of judicial immunity to actions brought pursuant to 42 U.S.C. § 1983."), cert, denied, 522 U.S. 997, 118 S. Ct. 562, 139 L. Ed. 2d 402 (1997); Fields v. Soloff, 920 F.2d 1114, 1119 (2d Cir. 1990) ("Judicial immunity is by now a well-established doctrine.... A judge defending against a section 1983 suit is entitled to absolute immunity from damages for actions performed in his judicial capacity.") n. 5

n5 See, e.g., Rolle v. Berkowitz, 2004 U.S. Dist. LEXIS 2035, 03 Civ. 7120, 2004 WL 287678 at *2 (S.D.N.Y. Feb. 11, 2004 ("Judges have absolute immunity from suit for judicial acts performed in their judicial capacities."); Sharp v. Bivona, 304 F. Supp. 2d 357, 363-64 (E.D.N.Y. 2004); Saint-Fleur v. City of New York, 2000 U.S. Dist. LEXIS 8814, 99 Civ. 10433, 2000 WL 280328 at *4-5 (S.D.N.Y. Mar. 14, 2000 (Peck, M.J.); Abrams v. Sprizzo, 1998 U.S. Dist. LEXIS 17527, 98 Civ. 5838, 1998 WL 778001 at *1 (S.D.N.Y. Oct. 29, 1998) (Rakoff, D.J. & Peck, M.J.), affd mem., 201 F.3d 430 (2d Cir. 1999); Sanchez-Preston v. Judge Luria, 1996 U.S. Dist. LEXIS 20123, No. CV-96-2440, 1996 WL 738140 at *4 (E.D.N.Y. Dec. 17, 1996); Fariello v. Campbell, 860 F. Supp. 54, 67-68 (E.D.N.Y. 1994); Levine v. County of Westchester, 828 F. Supp. 238, 243 (S.D.N.Y. 1993), affd mem., 22 F.2d 1090 (2d Cir. 1994).

[*12]

Absolute judicial immunity exists "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Bradley v. Fisher, 80 U.S. 335, 347, 20 L. Ed. 646 (1871); accord, e.g., Mireles v. Waco, 502 U.S. at 10-11, 112 S. Ct. at 287-88; Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S. Ct. 496, 499, 88 L. Ed. 2d 507 (1985); Stump v. Sparkman, 435 U.S. at 356-57, 98 S. Ct. at 1105; Pierson v. Ray, 386 U.S. at 554, 87 S. Ct. at 1218 (judicial "immunity applies even when the judge is accused of acting maliciously and corruptly"); D'amato v. Rattoballi, 83 Fed. Appx. 359, 2003 WL 22955858 at *1; Carley v. Lawrence, 24 Fed. Appx. 66, 2001 WL 1486227 at *1; Tucker v. Outwater 118 F.3d at 932; Young v. Selsky, 41 F.3d 47, 51 (2d Cir. 1994), cert, denied, 514 U.S. 1102, 115 S. Ct. 1837, 131 L. Ed. 2d 756 (1995); Carp v. Supreme Court, 1998 U.S. Dist. LEXIS 6570, No. 5:98-CV-201, 1998 WL 236187 at *1 (N.D.N.Y. May 5, 1998) (Pooler, D.J.). n6

> n6 See also, e.g., Saint-Fleur v. City of New York, 2000 U.S. Dist. LEXIS 8814, 2000 WL 280328 at *5; Sanchez-Preston v. Judge Luria, 1996 U.S. Dist. LEXIS 20123, 1996 WL 738140 at *4; Fariello v. Campbell, 860 F. Supp. at 68; Levine v. County of Westchester, 828 F. Supp. at 243.

[*13]

It goes without saying that the decisions in this Circuit have applied these principles to hold that suits against New York State judges are foreclosed by the doctrine of absolute immunity: "A claim for money damages against state court judges is foreclosed by absolute immunity from civil liability conferred upon judges acting within the scope

of their judicial capacities." Mulligan v. Travis, 1999 U.S. Dist. LEXIS 14606, No. 97-CV-6722, 1999 WL 759980 at *3 (E.D.N.Y. Sept. 20, 1999); see, e.g., DePonceau v. Pataki, 315 F. Supp. 2d 338, 343 (W.D.N.Y. 2004) ("Several of the defendants are either state court judges or court employees, who would have immunity. 'Judges performing judicial functions within their jurisdictions are granted absolute immunity.'"); Rolle v. Berkowitz, 2004 U.S. Dist. LEXIS 2035, 2004 WL 287678 at *2 ("[State j]udges have absolute immunity from suit for judicial acts performed in their judicial capacities."); Sharp v. Bivona, 304 F. Supp. 2d at 363 ("In addition, the claims against [State] Justice Bivona must be dismissed under the doctrine of absolute judicial immunity. It is well settled that judges are absolutely immune from suit for [*14] any actions taken within the scope of their judicial responsibilities or within his or her jurisdiction."); Weissbrod v. Housing Part of Civil Court of City of New York, 293 F. Supp. 2d 349, 355 (S.D.N.Y. 2003); L.B. v. Town of Chester, 232 F. Supp. 2d 227, 237 (S.D.N.Y. 2002) ("[State] Magistrate Masella is protected by absolute judicial immunity that protects judges from suits for civil damages under 42 U.S.C. § 1983 relating to the exercise of their judicial functions."); Carlino v. Hammer, 1992 U.S. Dist. LEXIS 4927, 91 Civ. 0466, 1992 WL 84843 at *2 (S.D.N.Y. Apr. 16, 1992) ("The Supreme Court has stated that even where plaintiffs allege that a state judge has participated in a corrupt conspiracy resulting in an injunction that injured plaintiffs, dismissal of the action against the state judge on absolute immunity grounds is proper."); Natale v. Koehler, 1991 U.S. Dist. LEXIS 9285, 89 Civ. 6566, 1991 WL 130192 at *3 (S.D.N.Y. July 9, 1991) (Leval, D.J.); Pizzolato v. Baer, 551 F. Supp. 355, 356 (S.D.N.Y. 1982) ("The Attorney General of the State of New York is correct in his assertion, on behalf of [then-State] Judge Baer, [*15] that he enjoys absolute immunity from civil liability for the claims asserted here arising out of his judicial acts."), affd,

No. 82-7921, 742 F.2d 1430 (table) (2d Cir. May 19, 1983); Holland v. Rubin, 460 F. Supp. 1051, 1052 (E.D.N.Y. 1978) ("Plaintiffs claim for money damages against the State court judges is foreclosed by the absolute immunity from civil liability conferred upon judges acting within the scope of their judicial capacities."); see also cases cited on pages 6-7 & fn.5 above.

Specifically, Lewittes claim arises from Justice Lobis' handling of his divorce action. Not surprisingly, disgruntled ex-spouses often bring claims against state court judges who have presided over divorce and child custody issues. State Supreme Court Justices sitting in the matrimonial part and Family Court judges, of course, are shielded by the same absolute immunity doctrine: "Family court judges are entitled to the same protections from harassment and intimidation resulting from actions taken in their judicial capacity as those afforded to other state and federal judges. Given the inherently emotional nature of their work, family court judges may be [*16] particularly susceptible to harassment." Sanchez-Preston v. Luria, 1996 U.S. Dist. LEXIS 20123, 1996 WL 738140 at *5; see, e.g., Carley v. Lawrence, 24 Fed. Appx. 66, 2001 WL 1486227 at *1 ("Plaintiffs claims against Judge Lawrence are based upon orders that he issued from the bench while presiding over a matter in Family court. Therefore, Judge Lawrence is entitled to absolute immunity for those acts."); Sharp v. Bivona, 304 F. Supp. 2d at 363-64 (Plaintiffs "claims against Justice Bivona stem from his judicial decisions while he presided love her matrimonial proceedings.... Thus, Justice Bivona is entitled to absolute judicial immunity against damages claims resulting from the acts of which the plaintiff complains."); Arena v. Department of Soc. Servs. of Nassau County, 216 F. Supp. 2d 146, 153 (E.D.N.Y. 2002) ("All of the plaintiffs claims against Judge Lawrence stem from his judicial decisions made while he presided over proceedings

in the Nassau County Family Court solely from actions as a judge. There is no evidence proffered, nor plausible claim suggested that Judge Lawrence was without jurisdiction to decide the matters at issue before him [* 17] or that he acted outside his judicial capacity. .. As such, Judge Lawrence is entitled to absolute judicial immunity from the claims seeking monetary damages."); DeJose v. New York State Dep't of State, 1990 U.S. Dist. LEXIS 18304, No. CV 89-3761, 1990 WL 263501 at *l-2 (E.D.N.Y. Nov. 13, 1990) (Raggi, D.J.), affd, 90-7481, 923 F.2d 845 (table) (2d Cir. Dec. 12, 1990), cert, denied, 500 U.S. 921, 114 L. Ed. 2d 110, 111 S. Ct. 2024 (1991).

As the Supreme Court has made clear, judicial "immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Mireles v. Waco, 502 U.S. at 11-12, 112 S. Ct. at 288 (citations omitted). n7

n7 Accord, e.g., Sharp v. Bivona, 304 F. Supp. 2d at 364; Rolle v. Berkowitz, 2004 U.S. Dist. LEXIS 2305, 2004 WL 287678 at *2; Saint-Fleur v. City of New York, 200 U.S. Dist. LEXIS 8814, 2000 WL 280328 at *5; Pollack v. Nash, 58 F. Supp. 2d 294, 303 (S.D.N.Y. 1999); Jones v. Newman, 1999 U.S. Dist. LEXIS 10171, 98 Civ. 7460, 1999 WL 493429 at *6 (S.D.N.Y. June 30, 1999); Reisner v. Stoller, 51 F. Supp. 2d 430, 442 (S.D.N.Y. 1999); Amaker v. Coombe, 1998 U.S. Dist. LEXIS 14523, 96 Civ. 1622, 1998 WL 637177 at *3 (S.D.N.Y. Sept. 16, 1998); Carr v. Village of New York Mills, New York, 1998 U.S. Dist. LEXIS 5526, No.

CivA96CV0042, 1998 WL 187395 at *2 (N.D.N.Y. April 15, 1998) (Pooler, D.J.); Sanchez-Preston v. Judge Luria, 1996 U.S. Dist. LEXIS 20123, 1996 WL 738140 at *4.

[*18]

Thus, to prevail on any claim against Justice Lobis, Lewittes would have to show that Justice Lobis either was not acting in her judicial capacity or was acting in the complete absence of jurisdiction. (See pages 6-10 above.) Lewittes concedes that Justice Lobis was acting in a judicial capacity. n8 Nevertheless, he asserts that she was acting in the complete absence of jurisdiction. (E.g., Am. Compl. P 12; Dkt. No. 30: Lewittes Opp. Br. at 4-13.)

n8 The Supreme Court has "made clear that 'whether an act by a judge is a "judicial" one relates to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.'" Mireles v. Waco, 502 U.S. at 12, 112 S. Ct. at 288 (quoting Stump v. Sparkman, 435 U.S. at 362, 98 S. Ct. at 1108). Here, Justice Lobis, sitting in the matrimonial part of State Supreme Court, ruled on an order to show cause regarding parental visiting rights for minor children involved in the parents' divorce - a function normally performed by a judge.

[*19]

III. BECAUSE JUSTICE LOBIS DID NOT ACT IN THE CLEAR ABSENCE OF JURISDICTION, SHE IS ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY

The test to determine whether a judge acted in the clear absence of jurisdiction has both an objective and a subjective prong. "This test, composed both of an objective element - that jurisdiction is clearly absent, i.e., that no reasonable judge would have thought jurisdiction proper - and of a subjective element - that the judge whose actions are questioned actually knew or must have known of the jurisdictional defect - protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction." Tucker v. Outwater, 118 F.3d 930, 934 (2d Cir. 1997) (quoting Maestri v. Jutkofsky, 860 F.2d 50, 53 (2d Cir. 1988), cert, denied, 489 U.S. 1016, 109 S. Ct. 1132, 103 L. Ed. 2d 193 (1989)).

Lewittes argues that Justice Lobis acted in the clear absence of jurisdiction by deciding issues brought to her by Blume and/or Burrows three days after she had terminated the matrimonial action. (E.g., Dkt. [*20] No. 15: Am. Compl. P 12.) This act, he asserts, is so egregious and erroneous that Justice Lobis must have known she was acting without jurisdiction. He states:

> Clearly, three days after Lobis signed the Judgment terminating the matrimonial action, there was no action between Blume and plaintiff [Lewittes]. Blume never commenced a new action. . . . There, accordingly, was a clear absence of jurisdiction, and any judge, having, three days earlier, signed a judgment terminating the action, must have known that there was a clear lack of subject-matter jurisdiction. Lobis, who further was put on notice of such clear absence of jurisdiction in the papers, of plaintiff herein, submitted to her and orally, without question, in fact, knew

that she clearly lacked all jurisdiction.

(Am. Compl. PP 12-13.) Lewittes defends this argument in his Memorandum of Law in opposition to Defendants' Joint Motion for Summary Judgment. (Dkt. No. 30: Lewittes Opp. Br. at 7.) Lewittes attacks the cases he asserts were relied upon by defendants as inapplicable, yet he does not cite to a single case supporting his argument that since, he claims, "the proper method of invoking jurisdiction [*21] is by a plenary action," actions similar to Justice Lobis' are in the clear absence of jurisdiction. (See Lewittes Opp. Br. at 7-11.) Upon review of Lewittes' briefs and the cases he cites therein, Lewittes has failed to cite a single case in which a matrimonial part Supreme Court Justice (or Family Court judge) acted in the clear absence of jurisdiction by deciding issues brought to the judge's attention by a spouse or guardian shortly after the judge had terminated the original matrimonial action.

Defendants submitted an affidavit from Justice Jacqueline Silberman, "the Administrative Judge of the Supreme Court, Civil Branch, New York County and the Administrative Judge for Matrimonial Matters for the State of New York." (Dkt. No. 21: Silberman Aff. P 1; see also id. PP 7-8.) Justice Silbermann makes clear that for judicial efficiency, where "either new cases involving the same parties or related cases [to a case] previously before a" matrimonial judge are filed, they are assigned to the original judge. (Silbermann Aff. PP 14-16 & Ex. A: Ops. Manual.) In addition, even after a judgment has been entered, the original matrimonial judge retains jurisdiction:

> 18. Similarly, [*22] the presiding matrimonial judge retains jurisdiction and authority to hear and render a determination upon application by the parties to a matrimonial action where a

judgment has been issued but new disputes regarding the marital or custodial relationship arise between the parties. It is the practice of the clerk's office of this court to accept notices of motion for filing and to accept an order to show cause for presentation to the judge in all matrimonial litigation, even after the judgment has been signed. The Operations Manual states, in pertinent part, that

> [a] matrimonial matter should be marked disposed when, but not before, a judgment of divorce is granted and all ancillary issues (e.g., maintenance, child support, custody, equitable distribution) have been decided. A judgment of divorce alone will not trigger a disposed marking. If a postjudgment motion is made, the matrimonial action should continue in the status of 'disposed,' but with 'motion pending.' Memorandum of Justice Jacqueline W. Silbermann, October 28, 1997.

See Exhibit "B", annexed hereto. Therefore, if a motion by a party is filed with the Supreme Court, New York County after entry [*23] of a judgment of divorce in the matter and issues contained in the application are related to the enforcement of the judgment, it is appropriate for the clerk's office to accept the application, whether by order to show cause or motion filed by either party, and to send that matter to

> the justice who was previously assigned to the case.

(Silbermann Aff. PP 18-19; see also Silbermann Aff. Ex. B: Ops. Manual excerpt.) Justice Lobis' action in deciding the issues raised in Blume's order to show cause application, even after the judgment of divorce was entered on August 19, 2002, thus was consistent with the New York Supreme Court's practices in matrimonial actions. (See Silbermann Aff. P 33.) n9

> n9 Defendants also argue that Justice Lobis' decision was proper because the divorce Judgment contained an express reservation of jurisdiction to enforce the divorce Stipulations. (See Dkt. No. 22: Defs. Br. at 6-7, 9-13.) The August 27, 2002 judgment of divorce provides that:
>
> > ORDERED and ADJUDGED that the parties' Stipulation of Settlement dated January 14, 2002, a copy of which is on file with the Court and incorporated by reference into this judgment, shall survive and not merge in this judgment, and the parties are hereby directed to comply with every legally enforceable term and provision of such Stipulation as if such term or provision were set forth in its entirety herein, and the Family Court shall be granted concurrent jurisdiction with the Supreme Court for the purposes of specifically enforcing such provisions of the Stipulation as

> are capable of specific performance, to the extent permitted by law, and of making further judgment as it finds appropriate under the circumstances existing at the time application for that purpose is made, or both.

(Dkt. No. 1: Compl. Ex. 1: 8/27/02 Judgment at p. 8.) Lewittes claims that in any event a "plenary action" was necessary. (See, e.g., Dkt. No. 15: Am. Compl. P 12; Dkt. No. 30: Lewittes Opp. Br. a 9.) The Court need not decide the retention of jurisdiction issue.

[*24]

The propriety of the first matrimonial judge deciding subsequent applications to modify a divorce judgment or handle related proceedings is recognized in the state case law. For example, in Maggiore v. Maggiore, 49 A.D.2d 1021, 1021, 374 N.Y.S.2d 177, 177 (4th Dep't 1975), a Supreme Court Justice granted a judgment of divorce and decided custody matters, and then a year later the husband sought to modify the prior judgment based on new developments, that application was heard by a different judge, and on appeal, the Appellate Division held:

> An opportunity was given the Court to transfer the matter to the original Justice who had handled it. Rather than transferring it, the second Justice undertook to delineate reasonable visitation rights and struck from the order that part of the visitation provision which required the husband's mother to be present. Although it denied custody, the Court

then went on to make more extended visitation privileges for respondent.

The first Justice had taken testimony, on the issue of visitation and made an order on that issue. The action of the second Justice in purporting to clarify or correct the judgment of the first Justice [*25] was an irregular and improper procedure. The matter should have been referred to the Judge who signed the original judgment. Such is the settled practice. It accords with the aim of sparing the time and effort of the second Justice to familiarize himself with a matter already familiar to a colleague. Deviating from this practice is wasteful of judicial time and, if countenanced, would cause confusion and vexatious litigation contraproductive to the orderly administration of justice. The rationale for the referral to the original Justice is pointedly apt in a matrimonial case involving, as it does, so many complex human entanglements and requiring considerable investment of judicial time for a single justice to educate himself.

Even though the power to modify a judgment of another Judge may exist, the long-continued course of practice, recognized and enforced by the courts, prohibits its exercise in any but exceptional cases and where it is not feasible to send the matter to the Judge who made the original order. We, therefore, conclude that the failure of the second Justice in this case to refer the

> proceeding to the first Justice was an abuse of discretion which requires reversal. [*26]

Maggiore v. Maggiore, 49 A.D.2d at 1021-22, 374 N.Y.S.2d at 177-78 (emphasis added, citations omitted); see also, e.g., Harrington v. Harrington, 60 A.D.2d 982, 984, 401 N.Y.S.2d 342, 344 (4th Dep't 1978) ("[A] contrary decision could be interpreted as a precedent countenancing an effort by an unsuccessful litigant in a contested matrimonial action to relitigate the issue of custody before a different judge. Such practice offends established rules against attempts to overrule a determination made by one judge in a matter by making a motion to vacate or modify the determination before another judge of coordinate jurisdiction.")

It should be noted further that Lewittes raised on appeal to the First Department his claim that Justice Lobis lacked jurisdiction to decide the order to show cause. (See Dkt. No. 21: Sugarman Aff. PP 58-59 & Ex. D: Lewittes 1st Dep't Pre-Argument Statement P 8: "The court below had no jurisdiction over one of the two motion sequences, there having been no underlying action.") The First Department affirmed Justice Lobis' decision. Lewittes v. Lewittes, 2 A.D.3d 295, 770 N.Y.S.2d 297 (1st [*27] Dep't 2003).

Even assuming arguendo that Lewittes were correct (which he is not) that Justice Lobis could not decide the motion brought on by order to show cause in the absence of the commencement of a new, plenary action (see Dkt. No. 27: Lewittes S.J. Br. at 8) - an action that in any event would have been assigned to Justice Lobis as a related case - such an "error" by Justice Lobis would not trigger the clear absence of jurisdiction exception to absolute judicial immunity. See, e.g., Allen v. Kleiman, 1991 U.S. Dist. LEXIS 17820, 91 Civ. 1179, 1991 WL 274329 at *1 (S.D.N.Y. Dec. 6, 1991) (In § 1983 suit against State

Supreme Court Justice who presided over Allen's criminal trial, Allen claimed he could not be criminally prosecuted until the State determined his tax liability collaterally to the criminal prosecution. Absolute judicial immunity applied: "Even assuming, arguendo, that plaintiff were correct, he would have shown only error, not clear absence of jurisdiction."), affd, No. 92-7084, 963 F.2d 1522 (table) (2d Cir. Apr. 29, 1992).

Lewittes relies on the Second Circuit case of Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988), [*28] cert, denied, 489 U.S. 1016, 109 S. Ct. 1132, 103 L. Ed. 2d 193 (1989), stating that this case "plainly demonstrates" Justice Lobis' judicial usurpation. (Lewittes Opp. Br. at 5; Dkt. No. 27: Lewittes S.J. Br. at 5-6; Dkt. No. 39: Lewittes S.J. Reply Br. at 4-9.) While Lewittes is correct that Maestri is the leading Second Circuit case establishing the test for determining what is a clear absence of jurisdiction, Maestri does not support his claim. The cases make quite clear that there is a difference between an action is erroneous or even in "excess of jurisdiction" and one that is in "the clear absence of all jurisdiction over the subject matter" such that absolute judicial immunity is unavailable. The Second Circuit's decision in Tucker v. Cutwater, 118 F.3d 930 (2d Cir. 1997), makes that quite clear, and the Court therefore quotes from that decision at length:

> Stump guides the determination of whether a judge acts in the clear absence of all jurisdiction or merely in excess of jurisdiction. In Stump, a mother petitioned an Indiana Circuit Court for authority to have her "somewhat retarded" fifteen-year old daughter sterilized. [*29] Circuit Judge Stump approved the petition the same day in an ex parte proceeding without a hearing and

without notice to the daughter or appointment of a guardian ad litem. The daughter was sterilized, having been told that she was having her appendix removed. Approximately two years later, the daughter learned that she had been sterilized. She sued, among others, Judge Stump. The district court dismissed the case against the judge on the ground that he was entitled to absolute immunity. The Court of Appeals reversed, holding that Judge Stump had acted in the clear absence of all jurisdiction. The Court of Appeals also held that the judge had forfeited whatever jurisdiction he had "because of his failure to comply with elementary principles of procedural due process." Stump, 435 U.S. at 355, 98 S. Ct. at 1104. The Supreme Court reversed, holding that Stump was entitled to judicial immunity. The Court found that Stump had acted within the broad jurisdictional grant conferred upon his court. Furthermore, the Court found that the Court of Appeals had "misconceived the doctrine of judicial immunity" in holding that the judge's failure to comply with elementary [*30] principles of due process precluded an immunity defense of his action. Id. at 359, 98 S. Ct. at 1106. The Court stated:

> A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. The Court made this point clear in Bradley, where it stated: "This

> erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever...."

Id. (internal citations omitted).

By reference to an illustration from Bradley, Stump further distinguished between an "excess of jurisdiction" and "the clear absence of all jurisdiction over the subject matter."

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But [*31] where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend.

Id. at 356 n. 6, 98 S. Ct. at 1104 n.6 (citing Bradley, 80 U.S. at 351). Bradley provided an example:

> Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and [*32] trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked.

See 80 U.S. at 352.

In Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988), the case relied upon by the district court here to reject the immunity defense, we elaborated on the distinction between a judicial act in excess of jurisdiction and an act in the clear absence of jurisdiction:

> Because scrutiny of a judge's state of mind would hinder the adjudicatory process in the very manner that the judicial immunity doctrine is designed to prevent, a judge will be denied immunity only where it appears, first, that the judge acted in the clear absence of jurisdiction, and second, that the judge must have known that he or she was acting in the clear absence of jurisdiction. [*33] This test, composed both of an objective element- that jurisdiction is clearly absent, i.e., that no reasonable judge would have thought jurisdiction proper -and of a subjective element - that the judge, whose actions are questioned actually knew or must have known of the jurisdictional defect-protects judicial acts from hindsight examination while permitting redress in more egregious cases, such as where a judge knowingly acts outside his territorial jurisdiction.

Id. at 53.

Maestri considered the immunity defense raised by Joseph Jutkofsky, the Town Justice of the Town of Taghkanic, New York. Justice Jutkofsky issued a warrant for the arrest of plaintiffs Maestri and Zook for their conduct in the Town of Germantown, New York. Maestri and Zook sued Justice Jutkofsky, among others, alleging deprivation of their rights pursuant to 42 U.S.C. § 1983. The district court dismissed the suit against Justice Jutkofsky on the ground of judicial immunity. This Court reversed, holding that Justice Jutkofsky acted in the clear absence of all jurisdiction and must have known that he was acting in the clear absence of all jurisdiction [since [*34] under state law a complaint and

warrant could only issue out of the town where the criminal offense had occurred].

Tucker v. Cutwater, 118 F.3d at 933-34 (emphasis in original). Here, Justice Lobis and her court clearly had jurisdiction over the subject matter of matrimonial actions and related child custody matters. Even if Lewittes were correct that a plenary action was required before Justice Lobis could reconsider child custody matters (or related guardian/fee matters), there is no doubt Justice Lobis had jurisdiction over the subject matter. Thus, even if she acted in error or in "excess of jurisdiction," Justice Lobis did not act in "the clear absence of all jurisdiction" over the subject matter. Justice Lobis thus is entitled to absolute judicial immunity.

Indeed, Lewittes points to no decision except Maestri that has found that a judge acted in the clear absence of all jurisdiction. (See Dkt. No. 27: Lewittes S.J. Br. at 5-6; Dkt. No. 30: Lewittes Opp. Br. at 5-6.) This Court's research has not found (1) another Second Circuit decision, or (2) any district court decision within this Circuit, that has found a judge to have acted in the clear [*35] absence of all jurisdiction so as to be deprived of absolute judicial immunity. n10.

> n10 Lewittes' argument would appear to, for example, strip immunity from a federal district court judge who decides a diversity action if it is later decided that the parties were not truly diverse. In such a case, it is true that the district court lacked subject matter jurisdiction. A judge who did not recognize this flaw in the diversity allegation, however, should still have absolute judicial immunity. The Court can imagine other examples where Lewittes' argument would deprive judges of

> absolute immunity for run of the mill errors that in some sense are "jurisdictional." That is not the law, nor should it be.

For these reasons, Justice Lobis did not act in the clear absence of jurisdiction, and accordingly is absolutely immune from suit. The Court should grant summary judgment to Justice Lobis dismissing all of Lewittes' claims, with prejudice, n11

> n11 This Court therefore need not reach the other grounds advanced by defendants for summary judgment for Justice Lobis. (See Dkt. No. 22: Defs. Br. at 25-45.)

[*36]

IV. LEWITTES' CLAIMS AGAINST BURROWS AND BBR ARE BARRED BY QUASIJUDICIAL IMMUNITY

Lewittes' remaining claims are against Burrows (and Burrows' law firm, BBR). (E.g., Dkt. No. 27: Lewittes S.J. Br. at 20-25.)

The doctrine of quasi-judicial immunity is important in maintaining the integrity of the judicial process by shielding persons who execute court orders. "The rationale for immunizing persons who execute court orders is apparent. Such persons are themselves 'integral parts of the judicial process.'" Wilkinson v. Russell, 973 F. Supp. 437, 441 (D. Vt. 1997) (quoting Briscoe v. LaHue, 460 U.S. 325, 335, 103 S. Ct. 1108, 1116, 75 L. Ed. 2d 96 (1983)), affd, 182 F.3d 89 (2d Cir. 1999), cert, denied, 528 U.S. 1155, 145 L, Ed. 2d 1072, 120 S. Ct. 1160 (2000). "Whether an official is entitled to absolute or qualified immunity depends on the nature of the official's functions at issue. 'Immunity is

justified and defined by the functions it protects and serves, not by the persons to whom it attaches.'" DeRosa v. Bell, 24 F. Supp. 2d 252, 256 (D. Conn.1998) (citing Forrester v. White, 484 U.S. 219, 227, 108 S. Ct. 538, 98 L. Ed. 2d 555(1988)). [*37]

New York case-law holds that guardians appointed by the court to assist with matters of child custody are entitled to quasi-judicial immunity. In Bluntt v. O'Connor, 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't), appeal denied, 98 N.Y.2d 605, 773 N.E.2d 1017, 746 N.Y.S.2d 279 (2002), relied upon by defendants (Dkt. No. 22: Defs. Br. at 22-23), the Appellate Division looked to decisions in other States and found that "most courts that have considered suits by disgruntled parents against attorneys appointed by courts to protect children in custody disputes have granted, on public policy grounds, absolute quasi-judicial immunity to the attorneys for actions taken within the scope of their appointments." Bluntt v. O'Connor, 291 A.D.2d at 116, 737 N.Y.S.2d at 478 (citing cases). The Appellate Division explained why quasi-judicial immunity was appropriate:

> The record in this case illustrates why quasi-judicial immunity is needed. Available remedies were not utilized. No request to the court for replacement of the Law Guardian was ever made and no appeal was perfected by plaintiff from any order made by Judge Rosa. Nevertheless, plaintiff brought [*38] two meritless lawsuits against Judge Rosa, and she brought this lawsuit against defendant, who was required to provide her own defense. Law Guardians are now compensated in New York for services in trial courts at the rate of $ 40 per hour for in-court

> time and $ 25 per hour for out-of-court time . ..
>
> Exposure of attorneys to tort liability to those they have been appointed to represent has not been mentioned in the cited articles as a factor affecting the willingness of qualified attorneys to accept appointments, but it is apparent that such exposure would exacerbate the problem. At least with respect to a Law Guardian appointed to represent a young child in a visitation dispute between parents, that disincentive is against public policy and should be eliminated. We agree with the Supreme Court of Wisconsin that there are other available remedies if a Law Guardian is derelict in performing his or her duties.

Id. at 118-19, 737 N.Y.S.2d at 480 (citations omitted).

In Bradt IV v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct. Greene Co. 2002), the court likewise held that a guardian for a child in a custody proceeding "has quasi-judicial [*39] immunity from civil liability for conduct directly relating to the performance of the law guardian's duty to further the best interests of the children." Bradt IV v. White, 190 Misc. 2d at 528, 740 N.Y.S.2d at 779. Like the Bluntt court, the court in Bradt IV found "numerous cases throughout this country holding that a guardian ad litem is entitled to quasi-judicial immunity." Bradt IV v. White, 190 Misc. 2d at 529, 740 N.Y.S.2d at 779 (citing cases). While Lewittes here claims that Burrows was a law guardian and not a guardian ad litem (compare Dkt. No. 27: Lewittes S.J. Br. at 20; Dkt. No. 30: Lewittes Opp. Br. at 13, with Defs. Br. at 22), the distinction is immaterial: "The [guardian's] roles are so intertwined as to warrant treatment of the law

guardian for immunity purposes in the same manner as a guardian ad litem whose role is to promote the best interests of the child." Bradt IV v. White, 190 Misc. 2d at 531, 740 N.Y.S.2d at 782; see also, e.g., Offutt v. Kaplan, 884 F. Supp. 1179, 1192 (N.D. 111. 1995) (guardian ad litem has absolute immunity). The Bradt IV court further noted [*40] that "the remedy for any alleged violation of an order of the Greene County Family Court is to petition that court for appropriate relief." Bradt IV v. White, 190 Misc. 2d at 535, 740 N.Y.S.2d at 784. In that regard, this Court notes that Lewittes challenged Burrows' actions and fees not only before Justice Lobis but also on appeal to the First Department, which ruled against Lewittes. n12 The Court agrees with the New York cases and holds that a law guardian or guardian ad litem appointed by the court in a matrimonial action is entitled to quasi-judicial immunity. The Court therefore should grant summary judgment to defendants Burrows and BBR dismissing Lewittes' claims. n13

n12 The First Department held:

> In addition, having, pursuant to the Stipulation, appointed Kenneth David Burrows as the children's law guardian in post-judgment proceedings, the court was clearly authorized to award Mr. Burrows legal fees without requiring him to commence a plenary action. The award to Mr. Burrows was proper notwithstanding the absence of a hearing upon his fee request, no hearing having been requested by defendant, who raised no complaint respecting the reasonableness of Mr. Burrow's fees or the need for his services.

Lewittes v. Lewittes, 2 A.D.3d 295, 296, 770 N.Y.S.2d 297, 298-99 (1st Dep't 2003). [*41]

n13 District Court decisions in this Circuit have held that a law guardian is not a state actor and thus could not be held liable under Section 1983. See, e.g., Arena v. Department of Soc. Serv. of Nassau, 216 F. Supp. 2d 146, 155 (E.D.N.Y. 2002); Elmasri v. England, 111 F. Supp. 2d 212, 221 (E.D.N.Y. 2000) ("Guardians ad litem, although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983"); Storck v. Suffolk County Dep't of Social Servs., 62 F. Supp. 2d 927, 941-42 (E.D.N.Y. 1999) ("It has been held that guardians ad litem, although appointed by the court, exercise independent professional judgment in the interests of the clients they represent and are therefore not state actors for purposes of Section 1983."); Di Costanza v. Henriksen, 1995 U.S. Dist. LEXIS 10540, 94 Civ. 2464, 1995 WL 447766 at *2 (S.D.N.Y. July 28,2995); Levine v. County of Westchester, 828 F. Supp. 238, 244 (S.D.N.Y. 1993). Thus, even if Burrows did not have immunity, he could not be sued for violating § 1983, absent an allegation, which Lewittes has made, that Burrows conspired with Lobis. (Dkt. No. 15: Am. Compl. P 5.) "To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." E.g., Pangburn v. Culbertson, 200 F.3d 65, 72 (2d Cir. 1999). Even when the state actor is a judge that is immune from suit, "it does not follow,

however, that the action against the private parties accused of conspiring with the judge must also be dismissed." Dennis v. Sparks, 449 U.S. 24, 27, 101 S. Ct. 183, 186, 66 L. Ed. 2d 185 (1980). "To act 'under color of state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting . . . 'under color' of law for purposes of § 1983 actions." Dennis v. Sparks, 449 U.S. at 27-28, 101 S. Ct. at 186; see also, e.g., Storck v. Suffolk County Dep't of Social Servs., 62 F. Supp. 2d at 940 ("Liability for participating in a Section 1983 conspiracy may be imposed on private individuals even if the state actor is immune from liability.").

Lewittes' amended complaint, however, asserts no factual basis for his conclusory conspiracy claim, except that Burrows moved for payment of his fees and Justice Lobis approved the fees (which decision was affirmed by the First Department, see page 22 n.12 above). Lewittes' conspiracy allegations are entirely conclusory, and therefore should be dismissed. See, e.g., Norley v. HSBC Bank USA, 2003 U.S. Dist. LEXIS 21976, 03 Civ. 2318, 2003 WL 22890402 at *4 (S.D.N.Y. Dec. 9, 2003) ("The fact that Justice Kornreich granted or denied a litigant's motion, or that Referee Lowenstein arrived at a figure for an award of attorneys' fees when given that assignment by the Court, are insufficient bases from which to infer the evidence of a conspiracy between judicial officers and a litigant."); see also, e.g., Wade v. Pataki, No. 02-0355, 75 Fed. Appx. 45, 46, 2003 WL 22134542 at *1 (2d Cir. Sept. 16, 2003) ("The district court's conclusion that the defendants were entitled to summary judgment on the conspiracy claim was also proper, as appellant presented no evidence, beyond bald assertions

and conclusory allegations, to establish a conspiracy among the defendants to deprive him of due process rights."); Webb v. Goord, 340 F.3d 105, 110-11 (2d Cir. 2003) ("The plaintiffs have not alleged, except in the most conclusory fashion, that any such meeting of the minds occurred among any or all of the defendants. Their conspiracy allegation must therefore fail."), cert, denied, 157 L. Ed. 2d 897, 124 S. Ct. 1077 (2004); Taylor v. Windsor Locks Police Dep't, No. 02-0100, 71 Fed. Appx. 877, 2003 WL 21697441 at *2 (2d Cir. July 22, 2003); Silverman v. City of New York, No. 02-9048, 64 Fed. Appx. 799, 801, 2003 WL 1970472 at *1 (2d Cir. Apr. 23, 2003)("The § 1983 conspiracy claim fails because [plaintiffs] allegations are unspecific, conclusory and unsupported."); Pangburn v. Culbertson, 200F.3d 65, 72 (2d Cir. 1999); Almonte v. Florio, 2004 U.S. Dist. LEXIS 335, 02 Civ. 6722, 2004WL 60306 at *5 n.13 (S.D.N.Y. Jan. 13, 2004)("Plaintiffs conspiracy claims, which are vague, conclusory and not supported by admissibleevidence, must be dismissed.").

[*42]

CONCLUSION

For the reasons stated above, defendants' summary judgment motion should be granted. n14

> n14 Lewittes' motion for Rule 11 sanctions for defendants' allegedly frivolous summary judgment motion (Dkt. No. 26) is denied, since defendants' motion was successful.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(l) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Jed S. Rakoff, 500 Pearl Street, Room 1340, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Rakoff. Failure to [*43] file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Am, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert, denied, 513 U.S. 822, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert, denied, 506 U.S. 1038, 113 S. Ct. 825, 121 L. Ed. 2d 696 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(l); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
August 19, 2004 Respectfully submitted,
Andrew J. Peck
United States Chief Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 2/24/06

Docket Number: 05-2219-pr
Short Title: Lewittes v. Lobis
DC Docket Number: 04-cv-155
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Jed Rakoff

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of March two thousand six.

Present:

Hon. Richard J. Cardamone

Hon. Pierre N. Leval

Hon. Robert D. Sack

CIRCUIT JUDGES,

David I. Lewittes,
Plaintiff-Appellant,
v.

Joan Lobis, Kenneth David Burrows, Bender, Burrows & Rosenthal, L.L.P.,
Defendant-Appellee.

A petition for panel rehearing having been filed herein by David I. Lewittes
Upon consideration thereof, it is
Ordered that said petition be and it hereby is **DENIED**.

For the Court,
Roseann B. MacKechnie,
Clerk

By: s/ Tracy W.Young
Motion Staff Attorney

UNITED STATES COUT OF APPEALS
FILED
MAR 6, 2006
Roseann R. MacKenchie, CLERK
SECOND CIRCUIT

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th day of December, two thousand and five.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. PIERRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges,

DAVID I. LEWITTES,

Plaintiff-Appellant,

No. 05-2219

- v -

JOAN LOBIS, KENNETH DAVID BURROWS, BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants-Appellees.

Appearing for Appellant: JOEL LEWITTES, New York, NY.

Appearing for Appellee: PATRICK J. WALSH, Assistant Solicitor General (Michael S. Belohlavek, Senior Counsel, Division of Appeals and Opinions, ELIOT SPITZER, Attorney General of the State of New York, of counsel), New York, NY for defendant-appellee Joan Lobis

Issued as Mandate: 3/14/06

UNITED STATES COURT OF APPEALS
FILED
DEC 28 2005
ROSEANN R. MacKECHNIE, CLERK
SECOND CIRCUIT

Rules and Statutory Provisions

28 U.S.C. § 636(b)(l) provides, in pertinent part, as follows:

Notwithstanding any provision of law to the contrary—

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A),. . . .

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

28 U.S.C. § 1254 provides in pertinent part, as follows:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . . .

28 U.S.C. § 1291 provides, in pertinent part, as follows:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . .

28 U.S.C. § 1367 provides, in pertinent part, as follows:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Fed. R. Civ. P. 11 provides, in pertinent pert, as follows:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information and belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. ... .

Fed. R. Civ. P. 72(b) provides, in pertinent part, as follows:

A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations...

Second Circuit Court of Appeals Rule, § provides as follows:

The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no

jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

Local Rule 56.1, of the Southern District of New York, provides as follows:

(a) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion.

(b) The papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party, and if necessary, additional paragraphs containing a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts set forth in the statement required to be served

by the moving party will be deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement by the movant or opponent pursuant to Rule 56.1(a) and (b), including each statement of material fact, must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e).

N.Y. Civ. Prac, L. & R 1202(a) provides, in pertinent part as follows:

The court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative or upon motion of:

1. an infant party if he is more than fourteen years of age; or

2. a relative, friend or a guardian, committee of the property, or conservator; or

3. any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service.

N.Y. Civ. Prac. L. & R. 5104 provides as follows:

Any interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person

required thereby or by law to obey it and, if he refuses or wilfully [sic] neglects to obey it, by punishing him for a contempt of the court.

N.Y. Dom. Rel. L. 236(9)(b) provides, in pertinent part, as follows:

> Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship...

N.Y. Dom. Rel. L. 240(1)(j) provides, in pertinent part, as follows:

> . . . Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under section two hundred and thirty-six of this article. Upon application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the

provisions of section two hundred and forty-four of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears.. . .

N.Y. Dom. Rel. L. § 244 provides, in pertinent part, as follows:

Where a spouse in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than a spouse when an action for an annulment is maintained after the death of a spouse, defaults in paying any sum of money as required by the judgment or order directing the payment thereof, or as required by the terms of an agreement or stipulation incorporated by reference in a judgment, such direction shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules. Upon application the court shall make an order directing the entry of judgment for the amount of arrears of child support together with costs and disbursements. The court shall make an order directing the entry of judgment for the amount of arrears of any other payments so directed, together with costs and disbursements, unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of arrears. The court shall not make an order reducing or canceling arrears unless the facts and circumstances constituting good cause are set forth in a written memorandum of decision. The application for such order shall be upon such notice to the spouse or other person as the court may direct....

N.Y. Dom. Rel. L. § 245 provides, in pertinent part, as follows:

Where a spouse, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment or declaration of nullity of a void marriage rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payments thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced pursuant to section two hundred forty-three or two hundred forty-four of this chapter or section fifty-two hundred forty-one or fifty-two hundred forty two of the civil practice law and rules, the aggrieved spouse may make application pursuant to the provisions of seven hundred fifty-six of the judiciary law to punish the defaulting spouse for contempt,. . . .

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OR COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeal for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th day of December, two thousand and five.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. PIERRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges. No. 05-2219

DAVID I. LEWITTES,

Plaintiff-Appellant,

-v-

JOAN LOBIS, KENNETH DAVID BURROWS, BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants-Appellees.

Appearing for Appellant: JOEL LEWITTES, New York, NY.

Appearing for Appellee: PATRICK J. WALSH, Assistant Solicitor General (Michael S. Belohlavek, Senior Counsel, Division of Appeals and Opinions, ELIOT SPITZER, Attorney General of the State of New York, of counsel), New York, NY for defendant-appellee Joan Lobis

HILARY B. MILLER, Greenwich CT for defendants-appellees Kenneth David Burrows and Bender, Burrows & Rosenthal, L.L.P.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Lewittes asserts that instant claim against Lobis, Burrows, and Burrow's law firm for conspiring or acting jointly to deny Lewittes's constitutional rights through Lobis's adjudication of two motions, which Lewittes contends Lobis lacked jurisdiction to decide.

A state court judge is not subject to a suit for damages for actions relating to the exercise of his or her

judicial functions, unless the judge acted in the clear absence of jurisdiction. Mireles v. Waco, 502 U.S. 9, 9-10 (1991) (per curiam). We think it clear in this case that Lobis did not act in the clear absence of jurisdiction. See Luisi v. Luisi, 6 A.D.3d 398, 400 (2d Dep't 2004) ("The defendant was not required to institute a plenary action, as he was seeking to enforce, rather than to modify the terms of the parties' stipulation of settlement which was incorporated but not merged in the judgment of divorce."). In this case, the court's August 19 Judgment of Divorce explicitly retained jurisdiction for purposes of enforcement. Lobis's orders were also in compliance with the New York Supreme Court's Operations Manual, which makes clear that a matrimonial matter is not marked disposed until both the judgment of divorce is granted and all ancillary issues are decided.[1] Lobis is therefore entitled to absolute immunity.

Similarly, whether as a "law guardian" or guardian ad litem, Burrows and his firm are also entitled to quasi-judicial immunity. See Bluntt v. O'Connor, 291 A.D.2d 106, 108, 737 N.Y.S.2d 471, 472-73 (4th Dep't 2002); Bradt v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct. Greene Co. 2002).

Finally, because the Defendants have not raised frivolous defenses, the District Court properly denied Plaintiff's motion for sanctions.

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[1] We also note that the New York courts have already decided that Lobis's award of Burrows's fees are proper. See Lewittes v. Lewittes, 2 A.D.3d 295, 296, 770 N.Y.S.2d 297, 298-99 (1st Dep't 2003). Because the issue of jurisdiction was "actually and necessarily decided" in that proceeding and Lewittes was afforded a "full and fair opportunity" to litigate there, he is estopped from relitigating jurisdiction before this Court. See Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995)

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: s/ Lucille Carr

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DEC. 28, 2005
Roseann B. MacKechnie, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OR COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeal for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of January, two thousand and six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. PIERRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges. No. 05-2219

DAVID I. LEWITTES,
Plaintiff-Appellant,

-v-

JOAN LOBIS, KENNETH DAVID BURROWS,
BENDER, BURROWS & ROSENTHAL, L.L.P.,
Defendants-Appellees.

Appearing for Appellant:	JOEL LEWITTES, New York, NY.
Appearing for Appellee:	PATRICK J. WALSH, Assistant Solicitor General (Michael S. Belohlavek, Senior Counsel, Division of Appeals and Opinions, ELIOT SPITZER, Attorney General of the State of New York, of counsel), New York, NY for defendant-appellee Joan Lobis
	HILARY B. MILLER, Greenwich CT for defendants-appellees Kenneth David Burrows and Bender, Burrows & Rosenthal, L.L.P.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Lewittes asserts that instant claim against Lobis, Burrows, and Burrows's law firm for conspiring or acting jointly to deny Lewittes's constitutional rights through Lobis's adjudication of several motions, which Lewittes contends Lobis lacked jurisdiction to decide.

A state court judge is not subject to a suit for damages for actions relating to the exercise of his or her judicial functions, unless the judge acted in the clear absence of jurisdiction. Mireles v. Waco, 502 U.S. 9, 9-10 (1991) (per curiam). We think it clear in this case that Lobis did not act in the clear absence of jurisdiction. See Luisi v. Luisi, 6 A.D.3d 398, 400 (2d Dep't 2004) ("The defendant was not required to institute a plenary action, as he was seeking to enforce, rather than to modify the terms of the parties' stipulation of settlement which was incorporated but not merged in the judgment of divorce."). In this case, the court's August 19 Judgment of Divorce explicitly retained jurisdiction for purposes of enforcement. Lobis's orders were also in compliance with the New York Supreme Court's Operations Manual, which makes clear that a matrimonial matter is not marked disposed until both the judgment of divorce is granted and all ancillary issues are decided.[1] Lobis is therefore entitled to absolute immunity.

Similarly, whether as a "law guardian" or guardian ad litem, Burrows and his firm are also entitled to quasi-judicial immunity. See Bluntt v. O'Connor, 291 A.D.2d 106, 108, 737 N.Y.S.2d 471, 472-73 (4th Dep't 2002); Bradt v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct. Greene Co. 2002).

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[1] We also note that the New York courts have already decided that Lobis's award of Burrows's fees are proper. See Lewittes v. Lewittes, 2 A.D.3d 295, 296, 770 N.Y.S.2d 297, 298-99 (1st Dep't 2003). Because the issue of jurisdiction was "actually and necessarily decided" in that proceeding and Lewittes was afforded a "full and fair opportunity" to litigate there, he is estopped from relitigating jurisdiction before this Court. See Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995)

Finally, because the Defendants have not raised frivolous defenses, the District Court properly denied Plaintiff's motion for sanctions.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: s/ Lucille Carr

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED JAN. 26, 2006
Roseann B. MacKechnie, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID I. LEWITTES,

Plaintiff,

04 CV 155 (JSR)(AJP)

JOAN LOBIS, KENNETH DAVID BURROWS,
BENDER, BURROWS & ROSENTHAL, L.L.P.,
Defendants.

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New York, N.Y.
February 19, 2004 2:00 p.m.

Before:

HON. ANDREW J. PECK,
Magistrate

Judge APPEARANCES

JASPAN, SCHLESINGER, HOFFMAN, LLP
Attorneys for Plaintiff
BY: JOEL LEWITTES

LAW OFFICE OF HILARY B. MILLER
Attorneys for Defendants Burrows, et al
BY: HILARY B. MILLER

STATE OF NEW YORK - OFFICE OF
ATTORNEY GENERAL ELIOT SPITZER
Counsel for Defendant Joan Lobis
BY: CHARLES F. SANDERS, Section Chief

MR. MILLER: Good afternoon, your Honor.
MR. BURROWS: Good afternoon, your Honor.
MR. LEWITTES: Good afternoon, your Honor.
THE COURT: Mr. Joel Lewittes?
MR. LEWITTES: Yes, your Honor.
THE COURT: Have you entered an appearance in this case?
MR. LEWITTES: Not yet. I have just been retained.
THE COURT: You are appearing; is that correct?
MR. LEWITTES: I am.
THE COURT: Consider yourself in the case and responsible under Rule 11, etc., but make sure to file the appropriate paperwork with the Clerk of Court.
MR. LEWITTES: Yes.
THE COURT: I've already received a letter from the Attorney General's office indicating an intent to move to dismiss on behalf of Defendant State Supreme Court Justice Joan Lobis. Now that we have counsel in the case for the plaintiff, are you intending to pursue this action against Judge Lobis?
MR. LEWITTES: Yes, of course.
THE COURT: Okay. Why don't you tell me why there is not absolute judicial immunity, at least for the judge, if not by extension for the law firm defendants?
MR. LEWITTES: Yes, sir. May it please the Court, this is a rare case. Rare in the sense that as one culls through the decisional law, one finds very few cases where there is a clear absence of jurisdiction. But there are such cases. And this is one of those cases where it is clear -- almost has to be undisputed, factually -- that there was a two-prong problem here with respect to Judge Lobis. Number 1, there was a clear absence of jurisdiction; and, Number 2, in fact, she knew that there was. So we have both the objective test and the subjective test.

We are not -- and it's perhaps easier at this point to indicate to the Court what we are not seeking, and that will also bring out why we are proceeding against Judge Lobis.

We are not, and I repeat that, seeking in any manner, shape or form to overrule, to modify or to seek any relief with respect to any particular ruling of Justice Lobis. What we are saying is, you Honor, that where there is a clear absence of jurisdiction and the court knows it, it is not the rule, it is the effect of such ruling under those circumstances that destroys judicial immunity.

Accordingly, if that be so, then this Brooker, Feldman proposed defense is inapplicable. We are not asking this Court, nor will we be asking any court lower than the Supreme Court, to overrule or modify a ruling of Justice Lobis or any State court decision.

THE COURT: Back up for a minute. Because your son is pro se -- I assume it's your son.

MR. LETWITTES: Yes.

THE COURT: His pro se complaint, which you may or may not have had a hand in drafting but which as filed was if it were a pro se complaint, is sufficiently lengthy that I can't say I've got it memorized. So let's try to help me out understanding what it is that you say Justice Lobis did. As I think I understand it, and this may show how much or how little I understand of your complaint, it's that Justice Lobis ruled on plaintiff's divorce. Then after that case was, in your view, complete, did some ruling with respect to child custody. And it's the latter that you say was without jurisdiction; is that correct?

MR. LEWITTES: That happens to be one of the prongs. What are we saying is that anything that came after the termination of the matrimonial action - - and that was terminated by order I believe - - judgment of August 19th, 2002 - - anything that came after that, except for one or two exceptions - - there are exceptions, your Honor, so the matrimonial lawyers will tell me, with respect to an enforcement proceeding. So when one seeks contempt with respect to that judgment, an enforcement proceeding seeking contempt, the Court would have jurisdiction. My son will

have to help me - - I believe there's also a retention of jurisdiction under Section 244 of the domestic relations law.
THE COURT: Is your son, the plaintiff, also a lawyer?
MR. LEWITTES: Yes. He's not a practicing lawyer. I'm doing the practicing.
THE COURT: And are you a matrimonial lawyer?
MR. LEWITTES: On, heavens no. Some people think I'm in a lower level of specialty. I'm a bankruptcy lawyer.
THE COURT: Some relationship perhaps.
MR. LEWITTES: I'm a former bankruptcy judge in the Southern District of New York.
THE COURT: All right. Slow down. And I may ask defense counsel to chime in. Fortunately, my knowledge of matrimonial law is limited. But let me try to cut through this and make sure I'm understanding where this is going.

I thought that the matrimonial part of the court, state court, retains jurisdiction to deal with child custody even after dissolution of the marriage. And that that is something that presumably is a statutory matter that the two of you should have your hand on and, you know, under Rule 11 you should know what we're talking about. Am I right or wrong?
MR. LEWITTES: I think you're wrong, Judge. I think that talks about support, not talking about custody.
THE COURT: All right. Let me make sure I understand, and then I'm going to ask defense counsel to chime in, and then I'll come back to you. Are you saying that if a justice of the Supreme Court is it supreme?
MR. SANDERS: Supreme Court.
THE COURT: A justice of the Supreme Court says this marriage is over, you're divorced, and that's all I'm dealing with today -- or that's all you've put in front of me -- that thereafter, there's no jurisdiction to decide which of the two ex-spouses gets custody of the kids? Since defense counsel is rising, let me find out who he is and hear from him.
MR. SANDERS: My name is Charles F. Sanders. I'm an Assistant Attorney General of the State of New York, and

I'm here representing Justice Lobis, Supreme Court Justice of New York County.

I'm not familiar with all the underlying details since I was not involved, but I will say that part of the proceedings here was that it wasn't simply as far as the divorce, and I think the stipulation, which is an exhibit, and I think it may be Exhibit 10 that has been presented to the Court, is also included as far as custody. So that is a matter that the Court does rule upon in all matters related thereto. And there was custody here, two children. I think there are two daughters that are involved. And any matter that the judge ruled upon was in accordance as to the issues that were presented to her.

So it's not necessarily a bifurcation, as you were asking as far as is it bifurcated. As to that, the judge only rules on just simply the divorce or the dissolving -- dissolution of the marriage itself and then thereafter the custody matter goes to another separate judge, or whether it goes to family court rather than stay in Supreme Court. No. Both matters stay with the presiding justice in the Supreme Court until all the issues are resolved. And here, though they indicate that there should have ueen some type of separation, Justice Lobis ruled upon the issues that were presented to her, and accordingly, any matters that they had a problem with, as far as what Justice Lobis did, I do think those matters should have been sent up to the appellate courts of the state rather than coming here as far as the federal court.

THE COURT: Was there an appellate review?

MR. MILLER: Yes, there was.

MR. SANDERS: Yes, there has been appellate review. There were certain matters brought up by Mr. Lewittes himself. He filed a notice of appeal. He filed a preargument statement. Some of the issues we're discussing right now as far as absence or want of jurisdiction were included within his preargument statements so those were issues that he had contemplated, he and his counsel, that could have been and should have been directed as to the appellate division.

There has been a determination by the appellate division on the appeal. To my knowledge, looking at the opinion, the issues which have been presented were affirmed as to what Judge Lobis did, and I also have to say that any issue, which seemingly should have been raised at the time, including the matters brought here, should have also been raised at that time including as far as any question as to the jurisdiction as to Judge Lobis, what she should or could or did.

Let's say under the circumstances, the state court and the appellate courts are the entity that could rule on the matter unequivocally and could have presented the relief, whether it was to reverse, remand, vacate or affirm. All those options are available as far as to the appellate division, First Department.

MR. LEWITTES: Your Honor, lest we get confused here

THE COURT: It's too late for that.

MR. LEWITTES: Well, lest I confuse it even more, there's no issue with respect to any of these allegations with respect to Judge Lobis about support or custody.

THE COURT: So what is it - -

MR. LEWITTES: We're talking about access.

THE COURT: What is it that Justice Lobis did that was in complete want of jurisdiction that has not already been decided by the -- I assume the First Department or whatever the appropriate appellate court is.

MR. LEWITTES: First Department had nothing to do with any of the issues here.

THE COURT: Well, why not?

MR. LEWITTES: Because it wasn't raised there.

THE COURT: Why not?

MR. LEWITTES: We --

THE COURT: Look, if I do something in total want of jurisdiction in this case, presumably the first step of any aggrieved litigant is either the district judge whose case it is or the Second Circuit or both, as the case may be. Not to sue

me thereafter for acting in the absence of jurisdiction. So I am totally confused as to what it is you're saying that Justice Lobis did that deprives her of absolute judicial immunity.

MR. LEWITTES: First of all, the judge, by the way, obviously has a duty sua sponte to raise jurisdiction. For example, in a similar situation we raised jurisdiction before, and she said we waived it somehow because of cross-claim. You know, Judge, according to the manner in which the Assistant Attorney General approaches this, you can never come into federal court. I could have raised Civil Rights I suppose in a state court. They have jurisdiction to hear this. If that's true, then you can never, ever. And that's not the case.

THE COURT: It's not the case, but the cases I'm thinking of have the judge, to settle a personal dispute in the total absence of any litigation, goes out and exercises judicial authority and hauls, you know, their landlord into court and says, you know, I'm locking you up and holding you in contempt unless you fix the boiler in the building or whatever. Here, what we appear to have is a dispute over the way Justice Lobis handled this matter more than the case, and perhaps some allegations that she was in bed with the wife's attorneys or something to that effect -- and I hope not literally but only figuratively but I'm troubled by thio becoming a separate lawsuit asking for, you know, hundreds of millions of dollars of relief.

MR. LEWITTES: We were dealing here with denials of access. There were claims of sexual abuse, none of which

THE COURT: But all of which was resolved or could have been resolved by the state court.

MR. LEWITTES: No, it could not have been. Because we argued

THE COURT: Time out. Time out.

MR. LEWITTES: Excuse me.

THE COURT: Either Justice Lobis ruled on something, in which case -- and virtually everything in state court is

immediately appealable, but certainly at some appropriate time, everything is appealable, and to the extent that it's a claim that the wife's attorneys had access to Justice Lobis that your son's attorneys didn't have or something that would be infecting the rulings and should have been raised in the appropriate forum in state court.
MR. LEWITTES: We're not claiming that.
THE COURT: But I'm still at a loss between the complaint and this oral argument - as to what it is that you're complaining that Justice Lobis did that can be redressed in federal court after full and fair appellate proceedings in state court have concluded.
MR. LEWITTES: Even the appeal they're talking about had nothing to do with this issue. What happened was --
THE COURT: But that's claim splitting, in that case
MR. LEWITTES: No, what happened was she would make decisions and then before you could do anything, it would be mooted because the access period was gone. And that was done all the time, successively.
THE COURT: Rulings on what in what access period? You've got to flesh this out. I'm not understanding it.
MR. LEWITTES: It's all set forth in the complaint, your Honor.
THE COURT: That assumes that I've read, under Rule a plain and short statement. This is 180 pages and 370 something paragraphs.
MR. LEWITTES: I know, but it makes it very, very-difficult. I'm saying this most respectfully.
THE COURT: I'm just asking you to help me. If you can't help me, then it's very simple --
MR. LEWITTES: You'll have to look at the complaint
THE COURT: No, I won't have to do anything except read the defendants' papers and your response to it.
MR. LEWTTTES: If that's what I have to do, I'll do
THE COURT: And I'm putting you on Rule 11 notice, sua sponte. That it appears to the Court, and I take it that by

appearing in this case, you personally, as well as your son, are standing up for this complaint as if you had signed it? Or should I put it a different way. Would you like leave to amend the complaint now that you, a respected, I assume, member of the bar is here in court as opposed to whatever your son, a nonpracticing lawyer, put in? And I recognize matrimonial cases and their aftermath are emotional and messy and all of that.

MR. LEWITTES: I know that.

THE COURT: And I have no idea whether, you know, your son got screwed, to use a technical legal term, before Justice Lobis and if he did, I feel sorry for him as a father, etc. But to make a federal case out of this, I really need, in less than 180 pages, to understand what it is that Justice Lobis did. And maybe the best thing to do, Mr. Lewittes, senior, is for me to give you 15 days or 30 days, whatever you think it is you need, to file an amended complaint signed by a member of the bar of this court -- you -- and trash the prior complaint.

MR. LEWITTES: I don't know that I have to trash the prior complaint.

THE COURT: I don't mean trash it. You have two choices. This is a family matter, but I'm not wasting my time. Either you tell me that you are going to be responsible for this complaint under Rule 11 or I'll give you leave to file an amended complaint; and if it's going to be the same one, you know, just change the signature page and put your signature on it. That's fine with me. I want a lawyer who's practicing. You're here, you've appeared. I want you responsible for the complaint and all of the allegations in it so that if any of the motions to dismiss are not only successful but prove that any of the claims against Justice Lobis or any other defendant are frivolous as Rule 11 defines that, that you will be responsible for it as well as your son.

MR. LEWITTES: I don't want the Court to take this as a moment of weakness in my position because I believe sincerely what we have is a well-pleaded complaint. But - -

THE COURT: You'd prefer to amend.
MR. LEWITTES: I will. Somebody told me discretion is the better part of valor. I don't think I need as much valor. I do believe that the picture that has been painted here is not only lopsided but destroying -- not by your Honor, but being characterized by these folks.

We have as 2 in the complaint, as you know, for purposes of Rule 11, by the way, that we are not claiming that our causes of action are based upon the corruption of Judge Lobis. That she is acting in excess of jurisdiction. All those things that -- all the cases the Civil Rights action cases talk about. About the frustrated, husband that comes marching across the street from 60 to 40 Foley Square or in this case 500 Pearl Street --to get another crack at the apple. I believe the complaint sets forth exactly with fine particularity a well-pleaded complaint under the Civil Rights Act, Section 1983 of 42 USC. However, I suspect that the Court has, for whatever reasons -- and telling us frankly that it has not read every jot and title of this complaint.
THE COURT: That's putting it mildly.
MR. LEWITTES: That it is still prepared to hold my feet to the fire with a Rule 11. And I find that
THE COURT: I'm prepared to do that for this reason and this reason only
MR. LEWITTES: Yes.
THE COURT: What little I've read of the complaint, and what little help today's discussion has given me, this appears to be an attack, rightly or wrongly, as a matter of fact - - that I don't know -- on the actions that Justice Lobis took as a sitting justice of the Supreme Court handling a matrimonial case. Perhaps handling it badly.
MR. LEWITTES: It's not a matrimonial case.
THE COURT: Or a child custody case.
MR. LEWITTES: No, it's not child custody. The minute the action is terminated by that judgment, there is no action.
THE COURT: Then that's easy, and maybe the easiest thing

to do is a partial summary judgment motion with respect to that. Because the date of that judgment appears to be August 19th, 2002, which appears to be clear and undisputed. And whatever occurred thereafter in Justice Lobis's court either is entirely without jurisdiction, as you're claiming, or, as I suspect defendants may be right but I don't claim to know enough matrimonial law to be sure, that there is continuing jurisdiction in the matrimonial part, despite a judgment of divorce.

MR. LEWITTES: That's fine.

MR. MILLER: May I be heard, your Honor?

THE COURT: Yes. Who are you.

MR. MILLER: A good question. My name is Hilary Miller. I represent the law firm defendants in this matter. And as a threshold matter, your suspicion is correct, as a matter of black letter matrimonial law in New York, the Supreme Court retains jurisdiction under Section 240 of the domestic relations law to enter appropriate post judgment orders in order to carry into effect its own judgment. In this case, the parties' stipulation which was incorporated in the judgment also expressly provided for the retention of jurisdiction by the Supreme Court. So -- as did the judgment itself. So it's our position that the judge's actions were entirely appropriate.

And as you also surmised, even if Judge Lobis was mistaken to render her authority about the decisions she's rendered, we still think she's absolutely immune under any circumstance.

However, having all that been said -- and we appreciate your willingness to hear argument on the motions we may someday be filing -- we are very happy to have Judge Lewittes in this matter. We view him as a cooler head, and I would hope that his introduction to this situation may assist the parties to ultimately resolving what in fact is a constellation of litigation that includes not only this matter but others.

So what we've agreed among counsel is that perhaps we could have some time for all of our heads to cool and then have a briefing schedule for these motions that perhaps start 30 to 45 days out. Perhaps in the meanwhile, we could alleviate a portion of your busy calendar.
THE COURT: All right. Well, that would certainly be nice. I take it your client was the attorney for the wife?
MR. MILLER: Our client was -- the individual attorney was the guardian ad litem for the parties' children, appointed by the Court.
THE COURT: Okay.
MR. MILLER: We take the position that he was a quasi-judicial officer, and his firm is also sued, although it's not clear on what basis.
MR. LEWITTES: First of all, there's only one judge in this room, sitting behind the bench. I'm not a judge here. I will say that Section 240 or 244 are not applicable. There is no retention of jurisdiction in the order.
THE COURT: Does somebody have a copy of the August 19th order with them?
MR. LEWITTES: It should definitely be in this load of exhibits we have.
MR. MILLER: It's Exhibit 5622, isn't it?
MR. LEWITTES: I think 23. May I approach the bench?
MR. SANDERS: Am I correct? The judgment is 23 and the stipulation is Exhibit 10.
MR. D. LEWITTES: One.
MR. SANDERS: Exhibit 1.
MR. LEWITTES: It was merged.
THE COURT: The stipulation is Exhibit 10.
MR. LEWITTES: Exhibit 10.
THE COURT: And do I take it from what you said before, Mr. Lewittes -- am I pronouncing your name right?
MR. LEWITTES: Well, it's very close, so for that you deserve credit. "Lewittes".
THE COURT: Lewittes. Sorry. Is the issue the access to

the children?
MR. LEWITTES: One of them.
THE COURT: That's one of the issues. Help me out one step further, since I am by far not a matrimonial lawyer. But the judgment of divorce gives exclusive custody to the wife and says the defendant shall have periods of access subject sorry, pursuant to the schedule set forth in the stipulation, and it further says that the stipulation is not merged into the divorce decree, but it is legally enforceable, etc., and that Family Court is granted concurrent jurisdiction with Supreme Court for purposes of enforcing provisions of the stipulation.

So, how can anything done thereafter having to do with, for example, access, be in total absence of jurisdiction to come without the absolute judicial immunity provision?
MR. LEWITTES: Let me just give you an example in a matter I know a little bit about, you're not going to know. In the bankruptcy field, a Chapter 11 case is a reorganization, a plan of reorganization. And there's a retention of jurisdiction and it's set forth in that retention of jurisdiction. In this case, there is no retention of jurisdiction.

In any event, we're not talking about support, from Section 240 that my friend Hilary is talking about. There is nothing in that agreement which says that this defendant is a guardian ad litem. He couldn't show you an order today that he's guardian ad litem.
THE COURT: But time out for a minute. No disrespect for the guardian. Perhaps this is judges taking care of their own. But I'm mostly focusing on the claim against Justice Lobis, claims against Justice Lobis. And it seems to me that it is clear, putting aside any provision of the necessary particular relations law, which I'm not familiar with other than its title, just looking at this document as filed, looking at a final judgment that I've signed that retains jurisdiction to deal with issues arising under the parties' settlement or arising under the Court's decree, it says jurisdiction is retained.

MR. LEWITTES: There's no retention of jurisdiction. It simply says it's concurrent jurisdiction.
THE COURT: If that's your best argument
MR. LEWITTES: No, it's not.
THE COURT: I suggest you find a fallback.
MR. LEWITTES: No, it's not.
THE COURT: In addition - - excuse me - - just one other point. You said there's nothing appointing Mr. Boroughs as guardian. How about Page 3?
MR. LEWITTES: What does it say?
THE COURT: Pursuant to the terms and provisions of the stipulation, Kenneth David boroughs, Esquire, or a successor chosen by the parties as provided in the stipulation, is hereby designated as law guardian on behalf of the children until the emancipation of each child, etc., etc.
MR. LEWITTES: I suspect, Number 1, it doesn't say guardian ad litem.
THE COURT: It says law guardian. I'm not sure what the distinction is.
MR. LEWITTES: I'll tell you. You refer to the stipulation. Since you refer to the stipulation, your Honor, it's good to check what do these -- the functions that were granted to this gentleman under the terms of the stipulation.
THE COURT: But if he violated that, jurisdiction over that either is in state court, matrimonial, pursuant to the retention of jurisdiction provision which you read differently than I do; or is perhaps some sort of separate action for malpractice or something in state court, you know, or federal court only if there's diversity against the guardian who would then have presumably some form of qualified immunity, perhaps. But I don't claim to know very much about guardians.
MR. LEWITTES: I think it's clear that at least for purposes of the Civil Rights act, the cases tell us this: That the guardian or guardian ad litem is not a state officer. We see it as a private actor participating with a state officer.
THE COURT: All right. Let me skip everything about Mr.

Burrows and keep the focus on the state actor because in the absence of a claim against the state actor, your claims against Mr. Burrows either disappear entirely or move across the street.

MR. LEWITTES: I'm not sure that's true. That isn't

THE COURT: Being as it's now 2:45, maybe what I need to do is decide with all of you on what steps you're going to take and have another oral argument after receiving the motion to dismiss and the amended complaint and everything else because at the moment, I don't think we're getting anywhere, other than you can see that the Court has some suspicions that the matrimonial dispute belongs in some court other than this one.

MR. LEWITTES: Judge, you had mentioned, and it had crossed my mind, too, before you ordered it, that it may be that partial summary judgment is the way to go. So I wonder if, in your pronouncement, you would give me the alternative to either amend the complaint or move for partial summary judgment within a date to be determined by the Court and the participants.

THE COURT: If the only issue is -- and it appears to be, or at least the threshold issue -- is any action taken by Justice Lobis after August 19th, 2002, the date of the judgment of divorce, relating to issues discussed and addressed by the parties' stipulation, Exhibit 10 to the complaint, whether that is outside of her jurisdiction or sufficiently far outside her jurisdiction to deprive her of absolute judicial immunity, if that is the legal issue which can be put before the Court with one or two facts, you know, about access to put a little flesh on that issue, then I suspect it is ripe for either summary judgment or a motion to dismiss or something. If we're going to get into a position where one or the other of you file lengthy papers that merely try to prove there's a factual dispute and therefore we've got to go on to trial, then you're just wasting your and my time.

MR. MILLER: Your Honor, we certainly agree with you

that this matter is appropriately decided on a relatively narrow question of law. But it is a question of law and it doesn't depend on undisputed fact; it depends on the pleadings, and we think this matter is entirely appropriate for disposition on the pleadings.

THE COURT: That may be. I'm just concerned that with, you know, 20 or 30 or whatever it is causes of action in this 135 pages, that I really don't want to delve into anything beyond the narrowest issue that is needed to threshold resolve it, which seems to be the parties' dispute over whether action taken by Justice Lobis after August 19th, 2002, pursuant to the retention of jurisdiction cause of the divorce agreement and stipulation of settlement and whatever domestic relations law provisions as set forth, that I'd be willing to entertain that on an early dispositive motion. I don't want something that goes to the 23rd cause of action for negligence or something. That doesn't seem to do any good.

MR. LEWITTES: Can I just amend, if I may, with your permission of course, your statement?

We are not saying that every action that was taken since the August 19th order was clearly in the absence of jurisdiction, because I told you there are exceptions to that. There are retention of jurisdiction provisions in the domestic relations law. There may have been -- I can't tell you as I stand before you -- but there may have been enforcement proceedings before Judge Lobis subsequent to August 19th, and some other matters that do fall within the retention of jurisdiction, statutory retention of jurisdiction.

THE COURT: But I take it your position is - - and maybe I'm wrong, so this is not a leading question - - but it appears that you are saying that anything other than what is contained in some provision of the domestic relations law is outside of Juice Lobis's jurisdiction despite what appears to this Court to be a retention of jurisdiction clause in the judgment of divorce?

MR. LEWITTES: Again may I amend that statement again? Because we're not saying that it's without jurisdiction, simply without jurisdiction. We say she could have had jurisdiction had a plenary action been filed. So I'm not saying that it's not within the general jurisdiction of Supreme Court of New York State. It is.

THE COURT: Then frankly, I think you've lost. Because putting this back into a ballpark that I can understand, you know, it's like saying, you know, somebody didn't make a motion for -- a motion to compel responses to interrogatories. They brought it before me at a discovery conference, and therefore I didn't have jurisdiction, arid when I screwed up my order, I was without authority sufficient to be not entitled to judicial immunity.

MR. LEWITTES: I think that's not what the law says, and I think that's what the cases tell us is law.

THE COURT: Then let's get a briefing schedule.

MR. MILLER: Yes.

THE COURT: I'll require you to amend the complaint. Give me a date you want to amend the complaint by to cut out the pleading of evidence, which is not required under Rule 8, and the Supreme Court's Schekowitz decision --I'm sure you know what I'm talking about. It's a recent Supreme Court decision in the employment discrimination field about what needs to be pleaded under Rule 8. Get rid of the allegations that are purely factual pleadings of evidence. Get rid of any causes of action that you, on second thought, believe should not be in the complaint, and get a lawyer's signature on the complaint so that you are responsible for it as an officer of the Court and subject to Rule 11. And then we'll --

MR. LEWITTES: I sat on the bench for awhile, too, and I didn't, with all due respect, bandy around Rule 11 that way.

THE COURT: Considering what I've heard, with all due respect, and I think you know, because this is a family relationship, you are not the dispassionate lawyer that you might be.

MR. LEWITTES: Then perhaps we should get another lawyer. If that is --
THE COURT: That's not the reason I'm talking Rule 11. I'm talking Rule 11 because you have brought a complaint against a sitting justice of the Supreme Court. Not that they can't make mistakes. Not that I can't make mistakes. Not that there aren't reports in the paper about investigations in Brooklyn and, you know, other things. I'm not saying judges are perfect. But I am saying there is a reason for the doctrine of absolute judicial immunity. And the narrow approach that you are taking to create an exception of that, or the narrow exception that isn't so narrow -- in any event, I'm troubled by it, as a gut reaction.

I do not intend to make any rulings today other than procedural ones as to the timing of what's going on, and when there is a motion, I will decide it, and subject to the something we'll talk about as to whether it's then going to go to Judge Rakoff for review or the Second Circuit. You know, there will be a judicial decision based on the papers.
MR. LEWITTES: Fine.
THE COURT: But you have appeared. If you want to get a matrimonial lawyer to represent --
MR. LEWITTES: This is not a matrimonial case.
THE COURT: All right. So, let's now go back to our scheduling. How soon can you get me an amended complaint?
MR. LEWITTES: May I confer?
THE COURT: Sure.
(Off the record)
MR. MILLER: Your Honor, we've agreed that the plaintiff would have till March 22nd to serve and file his amended complaint. The defendants would have till April 30th to serve and file a motion addressed to the amended complaint. And then May 21st? 20th? To file answering papers.
THE COURT: The 21st is the Friday. I'm assuming that's the one you wante

MR. MILLER: That would be fine.
THE COURT: And reply by May 28th. Can we keep it to a week?
MR. SANDERS: Actually, when's Memorial Day?
THE COURT: Appears to be May 31. If you want to destroy your Memorial Day weekend, I can give you till June 3 or 4.
MR. SANDERS: I don't want to destroy it. That's the reason I was asking.
MR. MILLER: A week will be fine.
THE COURT: The 28th. Fine. If you've read my rules you know I run a rocket docket and this is a more leisurely approach to the matter than. I would normally give you, but I am accepting your schedule on the ground that hopefully you will do something to simplify the case or perhaps settle it on your own. Otherwise, we will go and deal with it. And I may need oral argument on the motion; I may not. If you want it, ask for it in the cover letter or motion papers. Otherwise, I'll read the papers once the motion is fully briefed and go from there. Judge Rakoff has referred this case to me for reports and recommendations and dispositive motions. If you all wish to stipulate, pursuant to 28 U.S. Code Section 636(c) that you want to have my decision on the motion be dispositive, it requires all three parties to agree. In the absence of that, unless Judge Rakoff -- counsel for the plaintiff takes it back, I will be issuing a report and recommendation on the motion, and then you will have another bite at the apple with Judge Rakoff.

Somehow, I suspect that this is one of multiple volumes of appendices (indicating).
MR. LEWITTES: I'm sorry to say, the answer is yes.
THE COURT: I do not have a courtesy copy of the complaint or --
MR. LEWITTES: I have everything here for you.
THE COURT: I'll take it, I guess. And you all are reminded to read my rules and to provide me with courtesy copies of

your motion papers and anything else you may file. Other than because settlement discussions are going extremely well, I am not going to be likely be willing to extend the schedule at all because it is leisurely, so assume that you will be sticking to the schedule unless your settlement talks are sufficiently moving in the right directions that that's a reason that you all want to put things off. And I suspect you've heard enough from me today, but if at some point, since this seems to be one of multiple litigations floating around out there, if you think it would be useful to have a settlement conference in front of me or, because I'm ruling on the motions, if you would prefer to have it in front of one of my colleagues, let me know and I will consider it.

No guarantees. But I will consider it.

All right, Mr. Lewittes, Jr., if you could hand up the packages?

MR. LEWITTES: Thank you, your Honor.

THE COURT: And Mr. Lewittes, Sr., despite the fact that I've considered you appearing as of today --

MR. LEWITTES: Yes, of course.

THE COURT: You need to put in a formal appearance.

MR. LEWITTES: Yes.

THE COURT: And I would strongly suggest that if for nothing else, unless it's going to be necessary, since on a motion to dismiss attachments to the complaint can be considered, but you might want to save a tree or two and eliminate not only a lot of verbiage from the complaint, but a lot of the exhibits as well. But you're the lawyer, not me. You'll do what you think is necessary, and I'll deal with the motion and response to it.

All right. It is my practice in conferences like this to have a court reporter, and unless there is a vehement economic or other objection to require the parties to purchase the transcript, which if nothing else will be of use to me, I think, on a motion to dismiss. Do I hear any objections?

MR. SANDERS: No objections.

MR. MILLER: No, Judge.
THE COURT: Hearing none, I'm ordering all parties to order the transcript and split the costs rationally.
MR. SANDERS: Thank you.
(Adjourned)

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 26th day of January, two thousand and six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. PIERRRE N. LEVAL,
HON. ROBERT D. SACK,

Circuit Judges,

DAVID I. LEWITTES,

Plaintiff-Appellant,

- v - No. 05-2219

JOAN LOBIS, KENNETH DAVID BURROWS, BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants-Appellees.

Appearing for Appellant: JOEL LEWITTES, New York, NY

Appearing for Appellee: PARTICK J. WALSH, Assistant Solicitor General (Michael S. Belohlavek, Senior Counsel, Division of Appeals and Opinions, ELIOT SPITZER, Attorney General of the State of New York, of counsel), New York, NY for defendant-appellee Joan Lobis

HILARY B. MILLER, Greenwich, CT for Defendants-appellees Kenneth David Burrows and Bender, Burrows & Rosenthal. L.L.P.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed. S. Rakoff, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is AFFIRMED.

Lewittes asserts the instant claim against Lobis, Burrows, and Burrows's law firm for conspiring or acting jointly to deny Lewittes's constitutional rights through Lobis's adjudication of jurisdiction to decide.

A state court judge is not subject to a suit for damages for actions relating to the exercise of his or her judicial jurisdiction. Mireles v. Waco, 502 U.S. 9, 9-10 (1991) (per curiam). We think it clear in this case that Lobis did not act in the clear absence of jurisdiction. See Luisi v. Luisi, 6 A.D. 3d 398, 400 (2d Dep't 2004) ("The defendant was not required to institute a plenary action, as he was seeking to enforce, rather than to modify the terms of the parties' stipulation of settlement which was incorporated but not merged in the judgment of divorce."). In this case, the court's August 19 Judgment of Divorce explicitly retained jurisdiction for purposes of enforcement. Lobis's orders were also in compliance with the New York Supreme Court's Operations Manual, which makes clear that a matrimonial matter is not marked disposed until both the judgment of divorce is granted and all ancillary issues are decided.[1] Lobis is therefore entitled to absolute immunity.

---

[1] We also note that the New York courts have already decided that Lobis's award for Burrows's fees was proper. See Lewittes v. Lewittes, 2 A.D.3d 295, 296, 770 N.Y.S.2d 297, 298-99 (1st Dep't 2003). Because the issue of jurisdiction was "actually and necessarily decided" in that proceeding and Lewittes was afforded a "full and fair opportunity" to litigate there, he is estopped from relitigating jurisdiction before this Court. See Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995).

Similarly, whether as a "law guardian" or guardian ad litem, Burrows and his firm are also entitled to quasi-judicial immunity. See Bluntt v. O'Connor, 291 A.D.2d 106, 108, 737 N.Y.S.2d 471, 472-73 (4th Dep't 2002); Bradt v. White, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (Sup. Ct. Greene Co. 2002).

Finally, because the Defendants have not raised frivolous defenses, the District Court properly denied Plaintiff's motion for sanctions.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
s/
By:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DAVID I. LEWITTES,

Plaintiff,

-against-

JOAN LOBIS, KENNETH DAVID BURROWS, and BENDER, BURROWS & ROSENTHAL, L.L.P.

Defendants.

----------x

04 Civ. 0155 (JSR) (AJP)

ORDER

ANDREW J. PECK, United States Chief Magistrate Judge:

Plaintiff has declined the opportunity to amend the complaint. (See 3/12/04 Letter from Joel Lewittes, Esq. to the Court.) Therefore, defendants' motion to dismiss will be addressed to the original complaint, and plaintiff will not be allowed to amend his complaint in response to the formal motion. Defendants' motion to dismiss remains due by April 30, 2004 as set at the February 19, 2004 conference.

Discovery is stayed pending briefing and decision on the motion to dismiss.

SO ORDERED.

Dated: New York, New York
March 15, 2004

s/ Andrews J. Peck
United States Chief Magistrate Judge

Copies by fax to: Joel Lewittes, Esq.
Hilary B. Miller, Esq.
Charles F. Sanders, Esq.
Judge Jed S. Rakoff

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 20
Justice

MARILYN B. LEWITTES

-v-

DAVID I. LEWITTES

INDEX NO. 350120/01

MOTION DATE 09/19/02

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to 38 were read on this motion to/for _____

	Papers Numbered
Notice of Motion/Order to Show Cause-Affidavits-Exhibits...	1-14
Answering Affidavits – Exhibits X Motion and Exhibits:	15-21
Replying Affidavits Aff'd in Opp. To OSC: 22-35	

Def.'s response to LG's
X-Motion: 36-37
Reply Aff'd.: 38

Cross-Motion [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTIONS 005 & 007

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: 11/1/02 s/ _____
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 20
Justice

MARILYN B. LEWITTES

-v-

DAVID I. LEWITTES

INDEX NO. 350120/01

MOTION DATE 08/08/02

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to 38 were read on this motion to/for _____

	Papers Numbered
Notice of Motion/Order to Show Cause-Affidavits-Exhibits...	1-21
Answering Affidavits – Exhibits X Motion and Exhibits:	22-71
Replying Affidavits _____	72-78 79-104

Cross-Motion [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: 11/1/02 s/_____
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 20

----------X

MARILYN B. LEWITTES,

Plaintiff,

-against-

DAVID LEWITTES,

Defendant.

----------X

JOAN B. LOBIS, J.S.C.:

Motion Sequence Numbers 005 and 007 are consolidated for disposition.

The parties were married on December 7, 1997.[1] There are two children of the marriage, Elisa, born on August 17, 1998, and Jacqueline, born on March 30, 2000 (hereinafter the "Children"). The parties entered into a stipulation of settlement in January 2002 (the "Stipulation"), which was incorporated but not merged into the parties' judgment of divorce, dated August 19, 2002 (the "Judgment"). The Judgment was signed while one of the instant motions was sub judice and while the other was awaiting the submission of additional papers.

The Stipulation provides that plaintiff has sole custody of the Children, subject to the rights of defendant as set forth in the Stipulation. Specifically, the Stipulation provides that plaintiff "will consult, confer and discuss with [defendant] concerning decisions regarding the health, her

---

[1] Defendant husband commenced an action for divorce in 1999, which he discontinued by serving a Notice of Discontinuance on February 14, 2001. David Lewittes v. Marilyn Lewittes Index No. 313507/99. Plaintiff wife commenced the instant action on or about February 22, 2001.

sole decision-making authority for the children and from informing third parties that plaintiff does not have sole decision-making authority is granted. Notwithstanding defendant's rights of consultation, third parties have a right to assume that plaintiff's decisions are final and binding.

Plaintiff also seeks and order expanding the authority granted to Mr. Burrows under the Stipulation to the authority of a guardian ad litem, while defendant cross-moves for a declaration holding that Mr. Burrows' authority is limited to that Stipulation. According to the Stipulation, Mr. Burrows' role was outlined as follows:

> If the parties are unable to resolve any issues that may arise between them after the consultation required on such issue, they have designed Kenneth David Burrows, Esq., to act as Law Guardian on behalf of the children until the emancipation of each child. Should the parties not be able to agree when an issue is in dispute, the party alleging such dispute shall advise the Law Guardian of the dispute and the Law Guardian shall then take whatever steps in his/her discretion to assist the parties in their efforts to resolve such dispute in order to promote the best interest of the children.

Article IV, ¶ 3 (c). His role cannot be modified, except by an agreement in writing, subscribed and acknowledged by the parties with the same formality as the Stipulation. The parties clearly intended to limit the guardian's role to that of a mediator, who was available to hear those disputes that the parties were unable to resolve on their own and assist them in resolving them in the best interest of the Children. Although the parties agreed before this court on June 13, 2002 to change the law guardian's title to that of guardian ad

litem, it was stated on the record that such designation was only for the purpose of making his title consistent with the newly adopted standards of the Appellate Division governing law guardians, and was not intended to change the powers defined by the Stipulation. Therefore, that branch of plaintiff's application for an order expanding Mr. Burrow's authority, as granted by the Stipulation, is denied. That branch of defendant's cross motion for a declaration regarding the law guardian's authority is granted to the extent of declaring that the law guardian's authority is limited in accordance with Article IV, ¶ 3 (c) of the Stipulation.

Plaintiff seeks an order directing defendant to provide plaintiff with a working telephone number when the Children are with him. Defendant admits that he has, in the past, turned off his cellular phone the only telephone access, when the Children were in his care. According to the Stipulation, "each parent shall have reasonable telephone access to the Children at reasonable times." Therefore, this branch of the plaintiff's application for an order directing defendant to provide plaintiff with a working telephone number when the Children are with him, is granted to the extent of directing that defendant maintain a working telephone, which is always available to take all incoming calls, when the defendant is with the Children.

Plaintiff seeks an order directing that defendant provide plaintiff with the necessary documents and information to obtain COBRA coverage or proof that no such coverage is available to plaintiff. The Stipulation provides that the defendant is to provide medical insurance or plaintiff until the entry of the Judgment. After that time, defendant has no obligation to provide coverage, unless defendant has rights under COBRA. The Stipulation requires that with thirty days of execution, defendant "shall provide

[plaintiff] with the necessary documents and information for her to obtain such COBRA coverage for herself." While defendant maintains that his health insurance policy does not provide COBRA coverage, he has failed to provide plaintiff with any such proof. His statements are not conclusive, since he does not determine whether COBRA benefits are available.

ORDERED that the issues of (1) the reimbursement to plaintiff for medical expenses in accordance with Article V, ¶ 5 (a) o the Stipulation, a computation of the amounts previously paid by plaintiff regarding the medical bills, and the amount defendant is required to pay; and (2) determination of reasonable counsel fees to plaintiff for both motions, unless the parties are able to agree on such fees or agree to submit the issue to the court on papers, are referred to special referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by C.P.L.R. 4317, the special referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that the remaining issues in this motion are held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to C.P.L.R. 4403 or receipt of the determination of the special referee or the designated referee; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a special referee.

Dated: November 1, 2002

s/_____
JOAN B. LOBIS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS **PART 20**
Justice

Lewittes, M

-v-

Lewittes, D

INDEX NO. 350120/01
MOTION DATE 9/11/03
MOTION SEQ. NO. 18
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

		PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits		**1-10**
Answering Affidavits — Exhibits	**X Motions**	**11-17, 18-20**
Replying Affidavits		**21-23, 24-29**

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER.

Dated: 10/2/03 **s/ BL**

J.S.C

Check one:

[X] **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 20

----------X

MARILYN B. LEWITTES, Index No. 350120/01
Plaintiff,

Decision and Order

-against-

DAVID LEWITTES,
Defendant.

----------X

JOAN B. LOBIS, J.S.C.:

Defendant father moves, by order to show cause, to direct specific performance by plaintiff mother of the terms and conditions of the parties' stipulation of settlement, entered into on January 14, 2002 (the "Stipulation"), which was incorporated but not merged into the parties' judgment of divorce, dated August 19, 2002, with respect to raising the children in the Jewish faith.[1] Plaintiff mother cross-moves for an order restraining defendant and his representatives and agents from taping, photographing, videotaping or otherwise observing and/or recording plaintiff, the children, plaintiff's parents or any other member of plaintiff's family. She also seeks $5,000 in legal fees for opposing defendant's application and for enforcing the Stipulation. In a separate cross motion, Kenneth David Burrow, Esq., the guardian ad litem, seeks an order clarifying the role and responsibilities of the guardian ad litem or, in the alternative, relieving him

[1] The order to show cause also sought to hold plaintiff in contempt for allegedly violating the Stipulation. This court struck the request to hold plaintiff in contempt since there was no showing that a specific court order had been violated. The court also struck the provision directing plaintiff to enroll the children at The Ramaz School, since plaintiff has the final decision on matters regarding the health, education and welfare of the children.

form his role as guardian ad litem but reserving his ability to move of unpaid legal fees.

Jews, as well as Conservatives, eat only kosher, permitted foods in other restaurants." Defendant himself acknowledges the different standards of observance. This court will not examine or rule on the appropriateness of plaintiff's standard of religious practice with the children. See Matter of Ervin R. v. Phina R., 186 Misc.2d 384, 385 (Fam Ct. Kings Co. 2000) (Sunshine, J.).

In her cross motion, plaintiff states her belief that defendant has followed her or had her followed in order to check up on her observance of Jewish law and traditions. She contends that he could not have known of her whereabouts on various occasions without some kind of surveillance. There is no clear evidence that defendant is currently videotaping, audiotaping, or otherwise engaging in conduct that violates plaintiff's privacy. The request is denied.

Turning to Mr. Burrows' cross motion, in Motion Sequence 005, plaintiff sought an order expanding the authority granted to Mr. Burrows under the Stipulation to the authority of a guardian ad litem, while defendant cross-moved for a declaration holding that Mr. Burrows' authority s limited to that Stipulation. In the November 1, 2002 decision with respect to that motion, this court concluded that Mr. Burrow' role "cannot be modified, except by an agreement in writing, subscribed and acknowledged by the parties with the same formality as the Stipulation."

The Stipulation outlines Mr. Burrows' role as follows:

> [I]f the parties are unable to resolve any issue

> that may arise between them after the consultation required on such issue, they have designated Kenneth David Burrows, Esq., to act as Law Guardian on behalf of the children until the emancipation of each child. * * *
> Should the parties not be able to agree when an issue is in dispute, the party alleging such dispute shall advise the Law Guardian of the dispute and the Law Guardian shall then take whatever steps in his/her discretion to assist the parties in their efforts to resolve such dispute in order to promote that best interests of the children. ***

Article IV, ¶ 3 (c). As noted in the prior decision, "[t]he parties clearly intended to limit the guardian's role to that of a mediator, who was available to hear those disputes that the parties were unable to resolve on their own, and assist them in resolving them in the best interests of the Children. Although the parties agreed before this court on June 13, 2002 to change the law guardian's title to that of guardian ad litem, it was stated on the record that such designation was only for the purpose of making his title consistent with the newly adopted standards of the Appellate Division governing law guardians, and was not intended to change the powers defined by the Stipulation." Therefore, Mr. Burrows' cross motion to clarify his role and responsibilities must be denied; his role and responsibilities are established in the Stipulation.

As to his request to be relieved from his appointment, the Stipulation provides "[i]f for whatever reason, Kenneth David Burrows, Esq. can no longer serve as [guardian ad litem], the parties will use their reasonable efforts to agree on a new [guardian ad litem]." In support of his cross motion, Mr. Burrows states that defendant does not cooperate with Mr. Burrows whenever Defendant believes that Mr. Burrows does not support defendant's position. Mr. Burrows states

that defendant is not prepared to work with him in resolving disputes. To the extent Mr. Burrows believes that he needs permission of the court to be relieved from serving under the Stipulation, his request is granted. He need no longer serve as guardian ad litem for the children, and the parties are directed to proceed in accordance with their Stipulation to select a new guardian ad litem. Since Mr. Burrows' appointment is contained in a Stipulation that was incorporated but not merged into the judgment of divorce, Mr. Burrows shall be allowed to make a motion in the context of this matrimonial proceeding for any outstanding legal fees that may be owed to him by either party, and need not commence a plenary action for legal fees.[2]

The motion and cross motions are decided in accordance with the foregoing. Plaintiff and defendant are to bear their own fees for the cost of this motion. This constitutes the decision and order of the court.

Dated: October 2, 2003

JOAN B. LOBIS,

J.S.C

[2] Contrary to defendant's assertion, allowing Mr. Burrows to seek fees in the context of this matrimonial proceeding does not open the floodgates to allow every person with a connection to litigants to seek relief in the matrimonial proceeding. Persons or entities that are appointed by the court or consented to by the parties -- such as, *inter alia,* forensics, law guardians and appraisers -- may seek fees in the context of the matrimonial proceeding in which they were appointed. Strangers to the litigation, however, are not free to seek fees in the context of the matrimonial proceeding.

04 Civ. 0155(JSR)(AJP)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DAVID I. LEWITTES,

Plaintiff,

-against-

JOAN B. LOBIS, KENNETH DAVID BURROWS and BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants.

----------x

AMENDED COMPLAINT

Plaintiff, David I. Lewittes, by his attorney, as and for his

Complaint, alleges as follows:

The Parties

Plaintiff

1. Plaintiff, David I. Lewittes (hereinafter referred to as "plaintiff"), is a citizen of the United States and of the state of New York, residing in New York City.

Defendants

2. Defendant Joan B. Louis ("Lobis") is an individual, who is a Justice of the New York Supreme Court, New York County. Upon information and belief, Lobis is a Resident of New York State.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DAVID I. LEWITTES,

Plaintiff,

-against-

JOAN B. LOBIS, KENNETH DAVID BURROWS, and BENDER, BURROWS & ROSENTHAL, L.L.P.,

Defendants.

----------x

04Civ.0155 (JSR)(AJP)

NOTICE OF APPEARANCE

To all Parties and their Attorneys of Record:

Take notice that, as of February 19, 2004, the undersigned counsel has appeared in this action on behalf of plaintiff. Service of all pleadings, papers, and documents required to be served in this action should be served on plaintiff through his counsel as follows:

Joel Lewittes
1125 Park Avenue
New York, New York 10128
(516) 393-8254
State Bar Number: JL-6576

Dated: New York, New York
March 19, 2004

By: s/_____
JOEL LEWITTES
Attorney for Plaintiff

To: Charles F. Sanders, Esq.
Section Chief, Litigation Bureau
State of New York
Office of Attorney General
120 Broadway
New York, New York 10271-0332
Attorney for Defendant Joan B. Lobis

Hilary B. Miller, Esq.
112 Parsonage Road
Greenwich, Connecticut 06830-3942
Attorney for Defendants Kenneth David Burrows
and Bender, Burrows & Rosenthal, L.L.P.

At a Trial Term 20 of the Supreme Court of the State of New York held in and for the County of New York at the Supreme Courthouse, 60 Centre Street, New York, New York on the 19 day August 2002.

PRESENT

HON. JOAN B. LOBIS
Justice

----------X

MARILYN B. LEWITTES,
Plaintiff,

-against-

DAVID I. LEWITTES,
Defendant.

----------X

Index No. 350120/01

JUDGMENT OF DIVORCE

This action was submitted to this Court for Inquest on the 29th day of March 2001.

The defendant was personally served within the State of New York with a Summons with Notice and Verified Complaint for absolute divorce based upon DRL § 1701(1).

Defendant appeared by counsel within the 20 days required by law to answer the Complaint and interposed a Verified Answer.

Plaintiff testified on March 29, 2001 in open Court as to the grounds for divorce pursuant to DRL § 170(1) and defendant neither admitted nor denied the allegations of the Complaint read into the record and consented to the entry of judgment. Based thereon, the Court mad a finding that plaintiff offered satisfactory proof of her claim and reserved decision on entering Judgment of Divorce until the economic issues of the action had been concluded.

The Court accepted oral and written proof of non-military status.

The parties settle the ancillary issues of the action by written Stipulation of Settlement dated January 14, 2002

The plaintiff's address is 401 East 84th Street, Apt. 10-A, New York, NY 10028 and Social Security Number is 061-50-0734. The defendant's address is 1125 Park Avenue, New York 10028 and Social Security Number is 094-44-7267.

Now on motion of Schissle, Ostro, Karabatos, Poepplein & Taub, PLLC, attorney for defendant, it is

ORDERED, ADJUDGED AND DECREED that the marriage between MARILYN B. LEWITTES, plaintiff, and David I. Lewittes, defendant, is hereby dissolve by reason of the alleged cruel and inhuman treatment of the plaintiff by the defendant pursuant to DRL § 170(1); and it is further

ORDERED AND ADJUDGED that pursuant to the Stipulation of Settlement dated January 14, 2002 (hereinafter

the "Stipulation"), the plaintiff, subject to the rights of the defendant as set forth in the Stipulation, shall have sole custody of the parties' two(2) minor children, ELISA LEWITTES, born August 17, 1998, Social Security No. 068-88-8734, and JACQUELINE LEWITTES, born March 30, 2000, Social Security No. 053-90-6175; and it is further

ORDERED AND ADJUDGED that defendant shall have periods of access to the children pursuant to the schedule set forth in the Stipulation, and it is further

ORDERED AND ADJUDGED that pursuant to the terms and provisions of the Stipulation, plaintiff shall consult with defendant on issues regarding the health, education and welfare of the children in the manner set forth therein; and it is further

ORDERED AND ADJUDGED that pursuant to the terms and provisions of the Stipulation, Kenneth David Burrows, Esq., or a successor chosen by the parties as provided in the Stipulation, is hereby designated as Law Guardian on behalf of the children until the emancipation of each child to assist the parties to resolve, in the best interests of the children, any issues in dispute between them with regard to the health, education and welfare of the children, and it is further

ORDERED AND ADJUDGED that pursuant to the terms and provisions of the Stipulation, defendant shall pay directly to the plaintiff the following sums, as and for the support of the two (2) minor children, ELISA LEWITTES, born August 17, 1998, Social Security No. 068-88-8734, and JACQUELINE LEWITTES, born March 20, 2000, Social Security No. 053-90-6175.

ORDERED AND ADJUDGED that the marital property of the parties shall be distributed pursuant to the terms and provisions of the Stipulation; and it is further

ORDERED AND ADJUDGED that pursuant to the terms and provisions of the Stipulation, defendant shall maintain and pay for policy or policies of life insurance on his life having a total death benefit of $700,000, or $350,000 per child, for the irrevocable benefit of the minor children of the marriage, plus an additional policy or policies having a total death benefit of $200,000 for the irrevocable benefit of the plaintiff for so long as thee defendant is obligated to pay maintenance to the plaintiff, which total death benefits may be reduced annually in the manner provided in the Stipulation; and it is further

ORDERED AND ADJUDGED that the parties' Stipulation of Settlement dated January 14, 2002 a copy of which is on file with the Court and incorporated by reference into this judgment, shall survive and not merge in this judgment, and the parties are hereby directed to comply with every legally enforceable term and provision of such Stipulation as if such term or provision were set forth in its entirety herein, and the Family Court shall be granted concurrent jurisdiction with the Supreme Court for the purposes of specifically enforcing such provisions of the Stipulation as are capable of specific performance, to the extent permitted by law, and of making further judgment as it finds appropriate under the circumstances existing at the time application for that purpose is made, or both; and it is further

ORDERED AND ADJUDGED that the plaintiff is authorized to resume the use of a pre-marriage name, to wit, BLUME, or any former surname.

ENTER:

s/_____
J.S.C.

s/ Norman Chaadman
CLERK

FILED:
AUG 27, 2002

COUNTY CLERK'S OFFICE
NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

DAVID I. LEWITTES,
Plaintiff-Appellant,

v.

JOAN LOBIS, KENNETH DAVID BURROWS,
AND BENDER, BURROWS & ROSENTHAL, L.L.P.,
Defendants-Appellees.

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Docket No. 05-2219-pr

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, plaintiff-appellant, by his attorney, respectfully petitions this honorable Court for a rehearing of the appeal in the above-entitled cause, and, in support of this petition, represents to the Court as follows:

1. This Court overlooked or misapprehended several material facts and points of law, which, plaintiff respectfully submits, merit a rehearing.

Defendant Lobis

2. With respect to defendant Lobis, this Court's decision rests on its findings that (a) the state court retained jurisdiction for the purpose of enforcement and (b) that plaintiff complains of alleged deprivations of his "constitutional rights through Lobis's adjudication of two motions, which Lewittes contends Lobis lacked jurisdiction to decide," both of which, this Court found (without identifying these motions) were enforcement proceedings.

3. In fact, the Amended Complaint in this action complains of Lobis's purported adjudication of more than six alleged motions (A-39-40, 47, 57-58, 61-63; see also A-103, 110-17, 252), [1] all after the matrimonial action was terminated by the judgment of divorce ("Judgment"); even were some of those "motions" ostensibly and purposely constructed to appear that they were seeking to enforce the Judgment, virtually all clearly and indisputably cannot be construed as being in the nature of enforcement.

4. For example, one of the acts complained of against defendant Lobis is her alleged adjudication of a motion brought by plaintiff's ex-wife ("Blume") by order to show cause signed, by defendant Lobis, on September 24, 2003. (A-39-40, 117) Defendant Lobis, in her decision and order, dated January 12, 2004, on such application, indeed held that [u]nder the Stipulation [incorporated into the Judgment *(see* SA-77 [2])], [Blume] was responsible for the Condominium maintenance beginning in February 2002." (A-139) The Judgment itself expressly provides that Blume is to "be solely responsible for the costs of such apartment. ..." (SA-76) Nevertheless, defendant Lobis, in such purported order, directed plaintiff herein to pay a "share [of] the balance owed" for condominium costs from February 2002 (A-140). Thus, as Lobis conceded, the "motion" to hold plaintiff herein responsible for costs for which the Judgment makes Blume solely responsible, clearly was one for reformation of the Judgment.

5. By order to show cause, signed by defendant Lobis, on November 22, 2002 (A-40, 115), Blume moved and obtained an order from Lobis (A-83) both restraining plaintiff herein from

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[1] Citations to "A-__" are to the Appendix filed on the appeal herein.

[2] Citations to "SA-__" are to defendants' Supplemental Appendix filed (apparently without permission) on the appeal herein. The two documents contained therein are found in Exhibits 1 and 10 to plaintiff's original complaint.

attending a Thanksgiving party at his daughter's school, which he indisputedly had every right to attend pursuant to the Stipulation incorporated into the Judgment (see SA-21), and requiring him to provide Blume with employment information. This, too, clearly was not an enforcement proceeding. Indeed, nowhere in the "moving" papers, Exhibit 42, [3] was it even pretended that it was in the nature of enforcement.

6. Defendant Lobis, by her December 12, 2002, ruling, similarly excluded plaintiff from attending holiday parties at his children's school for which he had every right, pursuant to the Judgment, to attend. (A-40, 116) There can be no question that such also was not in the nature of an enforcement of the Judgment

7. The August 22, 2002, motion actually was for the purpose of restraining plaintiff herein from attending extra-curricular activities and non-routine, non emergency medical appointments, counseling sessions, etc., a modification of the Stipulation incorporated into the Judgment. Even were one to find, because couched in such terms, that such was an enforcement proceeding, the other deprivations that form the basis of the action against defendant Lobis could not, as shown herein, in any reasonable fashion, be found to be in the nature of enforcements of the Judgment.

8. The various orders and rulings of defendant Lobis arising from Blume's motions based on her false allegations of sexual abuse, all bases for this civil rights action against defendant Lobis, first suspending all of plaintiff s access to his children, then imposing supervised visitation, followed by onerous restrictions on his access, as a condition to seeing his children, including, too, the January 27, 2003, order to show cause, also

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[3] "Exhibit__" refers to the exhibits to plaintiff's original complaint.

awarding Blume costs against plaintiff in connection with Blume's false allegations of sexual abuse (A-39-40, 57-59, 114-16), certainly could not, in any way, shape, or form, be an enforcement proceeding.

9. As set forth in plaintiffs principal brief, on the appeal herein, dated June 29, 2005 (Plt. Br."), at 16-17, even were emergency measures then deemed to be required, N.Y. Civ. Prac. L. & R. 304 mandates that, for the court to acquire subject-matter jurisdiction, the court's initial order must provide for the commencement of an action, by the filing of a summons with complaint or notice, within 5 days. *See Schram v. Keane,* 279 N.Y. 227, 232-34 (1938).

10. Even assuming, *arguendo* only, that the Judgment in fact "explicitly retained jurisdiction for purposes of enforcement" (although the court below made no such finding), this Court's opinion, filed on December 28, 2005 (the "Opinion"), at 2 (and though no such retention of jurisdiction was cited by this Court or exists), because defendant Lobis entertained motions that were <u>not</u> to enforce the Judgment, all after the action had been terminated, without a new action, upon the purchase of a new index number, ever having been commenced, *see* Pit. Br. at 8-21; plaintiffs reply brief, dated September 13, 2005 (Pit. Reply Br."), at 1-5, by the express terms of this Court's Opinion, she indisputedly acted in the clear absence of subject-matter jurisdiction.

11. To be sure, although such alleged post-judgment motions clearly were not for the purpose of enforcement, at most, to the contrary, there is an issue of fact as to whether they were enforcement proceedings, also requiring a reversal of the judgment below.

12. Furthermore, there was no retention of jurisdiction, set

forth in the Judgment, for purposes of enforcement. The language employed (SA-77) is but "an acknowledgement of concurrency of jurisdiction," *Dillon v. Dillon,* 116 Misc. 2d 53, 455 N.Y.S.2d 68, 70 (Fam. Ct., Allegany Cty. 1982) *Cf. Green v. Green,* 50 A.D.2d 235, 236, 377 N.Y.S.2d 675 (3d Dep't 1975). It has nothing to do with the activation of such jurisdiction. Indeed, it does not state that the supreme court "retains" or "reserves" any jurisdiction whatsoever or that the supreme court may entertain a motion to enforce the Judgment. In *Renzulli v. McElrath,* 185 Misc. 2d 242, 712 N.Y.S.2d 267 (Sup Ct., Richmond Cty. 2000), *aff'd,* 286 A.D.2d 335 (2d Dep't 2001), the court noted that the very same operative language is intended only "to give notice to attorneys and litigants of the court's policy of concurrent jurisdiction with the Family Court." *Renzulli,* 712 N.Y.S.2d at 273 n. 3. It does not serve to or state that it retains jurisdiction for the court to entertain a motion when no action is pending. *See* Pit. Reply Br. at 6-8.

13. To the extent this Court relies on *Luisi v. Luisi, 6* A.D.3d 398 (2d Dep't 2004), the sole authority cited by this Court in support of its holding that defendant "Lobis did not act in the clear absence of jurisdiction," Opinion at 2, its reliance is entirely misplaced.

14. First, that case held that a court may not reform the parties' stipulation, incorporated into the divorce judgment, other than by plenary action. 6 A.D.3d at 401. Here, as shown, defendant Lobis decided motions to reform the Judgment and Stipulation incorporated therein, in the absence of a plenary action. In so doing, she acted in the clear absence of jurisdiction.

15. Furthermore, unlike here, that was a case in which a former spouse clearly was proceeding under an express statutory retention of jurisdiction, which expressly

permits the court to entertain a motion to enforce the support provisions of a divorce judgment or of a stipulation incorporated therein.[4] As set forth in *Fishkin v. Fishkin,* 201 A.D.2d 202, 207 (2d Dep't 1994), another second department case, upon which the second department relied in its decision in *Luisi, supra,* cited in the Opinion, a stipulation incorporated into a divorce judgment is "enforceable by way of a motion pursuant to Domestic Relations Law § 244." That statutory provision, a statutory retention of jurisdiction, is one of but three exceptions, *see supra* note 4, other than a contempt proceeding or by execution, to the inflexible rule, in New York, that, after the termination of an action, a court lacks subject-matter jurisdiction to entertain a motion, and a party must proceed by filing a new action, under a new index number. *See, e.g., Fox v. Fox,* 263 N.Y. 68, 70-71, 188N.E. 160, 160-61 (1933); *see also In the Matter of Solkav Solartechnik, G.m.b.H.[Besicorp Group],* 91 N.Y.2d 482, 672 N.Y.S.2d 838, 695 N.E.2d 707 (1998); *In the Matter of Carmen Crespo,* 123 Misc.2d 862, 864, 475 N.Y.S.2d 319 (Sup. Ct., N.Y. Cty. 1984). *Accord Wheelockv. Wheelock,* 3 A.D.2d 25, 27 (1st Dep't 1956), *aff'd,* 4 N.Y.2d 706 (1958); Practice Commentaries, McKinney's Consolidated Laws of New York Annotated, §244 ("Absent DRL § 244, a plenary action would be required to obtain an enforceable money judgment" based on non-payment of support provided by a divorce judgment or a stipulation incorporated therein) (1999) (Alan D. Scheinkman).

16. The remaining statutory authority for the supreme court to enforce a judgment, other than the three statutory retentions of jurisdiction cited above and other than by commencement of a plenary action or by execution, is by a contempt proceeding. *See* N.Y. Civ. Prac. L. & R. 5104; N.Y. Dom.

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[4] Such provisions, *all of which relate solely to spousal or child support and awards of moneys in divorce judgments*, are found in N.Y. Dom. Rel L. §236(9)(b); §240(1)(h); §244. *See also infra* note 9.

Rel. L. §245. None of the rulings of Lobis, the effect of which is a basis for this civil rights action against Lobis, was a ruling in a contempt proceeding.

17. It is undisputed that none of the rulings of Lobis, the consequence of which is a basis for the present action for damages against her, falls under any of the statutory reservations of jurisdiction, which relate solely to support and awards of money set forth in a divorce judgment. To be sure, the Opinion does not identify any statutory authority for Lobis's exercise of jurisdiction with respect to the acts complained of herein, though the question of whether she acted in clear absence of jurisdiction turns on the requirements of New York statutes. *Tucker v. Outwater,* 118 F.3d 930, 934-35 (2d Cir.), *cert denied,* 522 U.S. 997 (1997); *Maestri v. Jutkofsky,* 860 F.2d 50 (2d Cir. 1988), *cert, denied,* 489 U.S. 1016 (1989).

18. Moreover, because defendant Lobis decided motions under the facts presented here, that were not, under any reasonable and fair interpretation, in the nature of an enforcement, without a plenary action having been commenced, she acted in the clear absence of jurisdiction.

19. Lastly, with respect to defendant Lobis, this Court's Opinion, at 2, found, as well, expressly as a basis for holding that she is entitled to judicial immunity, that "Lobis's orders were also in compliance with the New York Supreme Court's Operation Manual, which makes it clear that a matrimonial matter is not marked disposed until both the judgment of divorce is granted and all ancillary issues are decided."

20. While "the provisions of the Civil Practice Law and Rules obviously take precedence over any rules of the court," *Brooks v. Hausauer,* 51 A.D.2d 661, 662 (4 Dep't 1976), and

Administrative Judge Silbermann, thus, by her manual, may not confer subject-matter jurisdiction upon defendant Lobis's court where it does not exist by statute, what this Court's Opinion cites from the operation manual is consistent with New York law. A judgment, under New York law, is final when it disposes of all of the causes of action between the parties. *Burke v. Crosson,* 85 N.Y.2d 10, 15 (1995).

21. Here, the matrimonial matter should have been marked "disposed" on August 19, 2002, when the Judgment was signed. To be sure, as is evident from the subsequent decretal paragraphs and has never been disputed here, the Judgment expressly sets forth that "[t]he parties settled the ancillary issues of the action by written Stipulation dated January 14, 2002," which Stipulation was incorporated into the Judgment. (SA-71,77)

22. Thus, once more, by the very terms of this Court's own Opinion, it is clear that the action was terminated, by the Judgment, on August 19, 2002. All ancillary issues were decided by the Judgment, which incontestably deprived defendant Lobis of all subject-matter jurisdiction to act, absent the commencement of a plenary action, upon the purchase of a new index number. *See* Pit. Br. at 8-21; Pit. Reply Br. at 1-10.

23. Indeed, as is abundantly clear from the record, defendants, too, admitted in their Local Rule 56.1 Statement, below, that the action terminated when the Judgment was signed on August 19, 2002. (A-100, 243 (paragraph 1))

24. Defendant Lobis acted in the clear absence of jurisdiction, and, accordingly, a rehearing should be had concerning that portion of the Opinion that held otherwise.

Defendant Burrows

25. There was no appointment of defendant Burrows as a guardian for plaintiffs children, in any legal sense or ever by the Court. Nevertheless, this Court, in its Opinion, citing inapposite cases concerning guardians appointed by the court to assist the courts, held that he is entitled to quasi-judicial immunity.

26. Despite admissions by defendants, that Burrows (thus, clearly, improperly), nevertheless, acted at all times as a true guardian *ad litem, see* Plt. Br.at 23, and the overwhelming documentary evidence that, acting jointly, defendant Lobis treated him, despite his never having been so appointed, as a true guardian *ad litem, see id.* at 24, the state court's ruling, which this Court now impermissibly seeks to overturn, is that defendant Burrows was appointed, not by the state court, but, rather, by plaintiff and Blume, in their Stipulation incorporated into the Judgment, and not as a true guardian, but, rather, as a mediator, to assist, not the court, but, rather, the parties to the Stipulation. (A-22) Defendant Lobis, in a portion of an order never appealed from, *see* PL Reply Br. at 16 n. 15, denying a pre-judgment motion seeking "an order expanding the authority granted to Mr. Burrows under the Stipulation to the authority of a guardian ad litem" (A-l 1, 22), held, thus, that Burrows's "role [as a mediator] cannot be modified [including by this Court], except by an agreement in writing subscribed and acknowledged by the parties [to the Stipulation] with the same formality as the Stipulation." (A-22)

27. To be sure, the Judgment provides, too, that the mediator is chosen by the parties thereto, to assist them to resolve disputes between them. (SA-72) It is not a court appointment or in aid to the court.

28. The defendants, jointly, also, in their Local Rule 56.1 Statement below, admitted that plaintiff and Blume appointed

Burrows. (A-337) *See also* A-245 (para. 6) wherein defendants admit that defendant Burrows's role was limited to that of a mediator. On appeal herein, defendants also, albeit vaguely, in an obvious attempt artfully to dodge, stated that defendant Burrows may have been but a mediator, though, in conflict with the facts, including the order of defendant Lobis and their joint admission, falsely asserted that he was appointed by the state court. *See* defendants' brief on appeal at 13 ("guardian or mediator"), 25 ("whatever [his] role was"), 26 (may have been a mediator), 32 (conceding, perhaps, that was "merely serving" as a mediator). Defendants, while insisting, below, that Burrows acted, at all times, only as a true guardian *ad litem,*[5] admitted, on appeal, at least, that perhaps he was not acting in accordance with his actual role of a mediator, not appointed by the court or to assist it.

29. Indeed, Burrows, in connection with a post-judgment contempt proceeding, *see* Exhibit 20, "cross-moved,"[6] in part, to clarify his role. Lobis, citing and quoting from her November 1, 2002, decision (A-22-23), which held that he was but a mediator, not appointed by the court or in aid of the court, denied his motion insofar as "his role and responsibilities are established in the Stipulation." Exhibit 46 at 5. Because Burrows is a "state court loser" on this issue, this Court is deprived, by the Rooker-Feldman doctrine, of subject-matter

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[5] Before the district court, in their memorandum of law in support of their motion for summary judgment, dated April 30, 2004, defendants stated, unequivocally, that "all actions . . . taken by Burrows were conducted in [his then falsely asserted, later recanted] official capacit[y] as . . . a guardian *ad litem* . . . ."

[6] Burrows was not a party but nonetheless "crossed moved" against plaintiff, in that proceeding. *See* N.Y. Civ. Prac. L. & R. 2215.

jurisdiction to revisit this issue. *See Exxon Mobil Corp v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1521 (2005).[7]

30. The two New York state cases relied on this Court's Opinion at 2-3, on the issue of quasi-judicial immunity, demonstrably are inapposite. *Bluntt v.O'Connor,* 291 A.D.2d 106, 737 N.Y.S.2d 471 (4th Dep't 2002), was decided on the basis of standing, *see Bluntt,* 291 A.D.2d at 108, 113-15, 119-20; the court, there, specifically, limited its *dicta* concerning guardians to legal malpractice suits "by disgruntled parents against attorneys appointed by courts to protect children in custody disputes ... for actions taken within the scope of their appointments." *Id.*at 115-16 (emphasis supplied). In any event, this is not a legal malpractice action, and Burrows concededly did not act in the scope of his appointment.

31. In *Bradt v. White,* 190 Misc. 2d 526, 529, 532, 740 N.Y.S.2d 777, 779, 782 (Sup. Ct., Greene Cty. 2002), the court held that immunity does not extend to an intentional tort, 190 Misc. 2d at 535, 740 N.Y.S.2d at 784, and, hence, there could be no basis for finding an immunity from a suit for damages in this Section 1983 action for Burrows's willful joint participation with defendant Lobis.

32. Furthermore, the decisions of the district courts in this Circuit have found that a true guardian is not a state actor and, therefore, could not be afforded quasi-judicial immunity. *See, e.g.,* the cases cited in the report and recommendation of the

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[7] Were there no preclusion, and, indeed, here, no subject-matter jurisdiction over this issue, the most, to the contrary, this Court nevertheless could find, it is submitted, is an issue of fact, as to whether Burrows was or acted as a true guardian, precluding the lower court's grant of summary judgment to defendants and still requiring reversal.

magistrate below, in footnote 13 (A-296).[8]

33. Clearly, defendant Burrows's function could not have been in aid of the court, when he was charged to use his "discretion to assist the parties" to the Stipulation. (SA-10) (emphasis supplied); his sole function, in any judicial proceeding, was to testify as a witness if called by either parent. (SA-10) He was not court-appointed, did not function in aid of the court, acted outside the scope of his appointment by plaintiff and Blume, and clearly is not entitled to quasi-judicial immunity for any of his actions complained of herein, which were not as a witness.

34. Furthermore, because defendant Lobis acted in the clear absence of jurisdiction, Burrows could have no immunity for such acts in which he participated.[9]

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[8] Under the New York cases cited in the Opinion, too, because he was to exercise independent judgment, as a mediator, and his function was not integrally connected to the judicial process, in any event, Burrows would not be entitled to immunity. *See Bluntt,* 291 A.D.2d at 117; *BradtIV,* 190 Misc. 2d at 535, 740 N.Y.S.2d at 784.

[9] The award of fees to Burrows as a mediator, pursuant to the Stipulation, in accordance with which, in federal court, defendants admit Burrows never acted, is irrelevant and not a component of plaintiff s claims. An award of fees to him is relevant only insofar as it is incidental to plaintiffs claim that Burrows acted as a phony guardian *ad litem,* in deprivation of plaintiffs rights, and that issue never was presented to or decided by the state courts, *see* Pl. Br. at 29; Pit. Reply Br. at 19. Furthermore, contrary to this Court's Opinion at 2 n. 1, the issue of jurisdiction relevant herein was not decided by the state courts. The state court held, consistent with the statutory retention of jurisdiction in N.Y. Dom. Rel. L. §244, which applies also to the payment of "any sum of money as required by the [divorce] judgment. . . or stipulation incorporated by reference in a judgment," including to a third-party, that Burrows was entitled to move for fees provided for in the Stipulation; nothing more and nothing less. *See also* Pit. Br. at 6n. 3.

Sanctions

35. A rehearing also should be held on that portion of the Opinion upholding the lower court's denial of plaintiff s motion for sanctions because defendants asserted defenses not warranted by existing law, including a defense on the basis of the *Younger* doctrine, which is inappropriate where, as here, the claim is for money damages under 42 U.S.C. §1983, *see Rivers v. McLeod,* 252 F.3d 99, 101-02 (2d Cir. 2001), and as set forth herein.

Wherefore, plaintiff-appellant, David I. Lewittes, respectfully requests that a rehearing be granted and that, on rehearing, this Court's Opinion be withdrawn, and this Court enter a new opinion reversing the judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge) and granting plaintiff-appellant's motions for partial summary judgment and for sanctions.

Dated: New York, New York
January 9, 2006

Respectfully submitted,

s/_____
Joel Lewittes (JL-6576)
Attorney for Plaintiff
1125 Park Avenue
New York, New York 10128
(516)393-8254